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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1121

ESTES EXPRESS LINES, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

JURISDICTIONAL STATEMENT

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IN THE

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ESTES EXPRESS LINES, ET AL.,
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v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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JURISDICTIONAL STATEMENT

Appellants, Estes Express Lines, Great Coastal Express, Inc., Hemingway Transport, Inc., Long's Express, Inc., Service Transport, Inc., and Wilson Trucking Corp., appeal from the judgment of the United States District Court for the Eastern District of Virginia dismissing their complaint to set aside an order of the Interstate Commerce Commission and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court has not been reported as of the time of the filing of this Statement. A copy of the opinion is set forth as Appendix A. A copy of the Interstate Commerce Commission's order in Docket No. MC-66562 (Sub-No. 2262TA), *Railway Express Agency Incorporated, New York, New York,* dated December 7, 1967, and served December 14, 1967, is attached as Appendix B.

JURISDICTION

This suit was brought under 28 U.S.C. § 1336, 1398, 2321-2325, to set aside the order of the Interstate Commerce Commission. (Appendix B) The judgment of the District Court was entered on November 13, 1968, and notice of appeal was filed in that court on January 9, 1969.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§ 1253 and 2101(b). And the following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal: *United States* v. *Drum*, 368 U.S. 370 (1962); *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1 (1960); *Frozen Food Express, Inc.* v. *United States*, 351 U.S. 40 (1956).

STATUTES INVOLVED

The statutes involved are the Interstate Commerce Act; Section 210a(a), 49 U.S.C. § 310a(a), and Section 207, 49 U.S.C. § 307; and Temporary Authority Regulations, 49 C.F.R. § 1131, all of which are set forth in Appendix C.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission is bound by its own regulations governing the issuance of

temporary authority franchises to motor carriers under Section 210a(a) of the Interstate Commerce Act;

2. Whether Railway Express Agency, Incorporated (Railway Express), when applying for temporary authority is required to meet the statutory provisions of Section 210a(a) of the Interstate Commerce Act and the Commission's rules and regulations governing the disposition of applications for such authority;

3. Whether the District Court was correct in affirming the order and holding of the Commission granting temporary authority to Railway Express under Section 210a(a).

STATEMENT

This controversy began with an application filed on October 30, 1967, by Railway Express under Section 210a(a) of the Interstate Commerce Act for 150-day temporary authority to operate as a common carrier by motor vehicle, over regular routes, transporting general commodities, moving in express service, between Washington, D. C., and Richmond, Va., serving named intermediate and off-route points. Notice of the filing of the application was published in the *Federal Register* on November 7, 1967, and appellants filed protests.

By order of the Commission, by its Temporary Authorities Board (Appendix B), the application was granted on the ground that Railway Express had established an immediate and urgent need, as required by law, for the temporary service proposed. On December 27, 1967, appellants filed a petition with the Commission seeking reconsideration of the order of the Temporary Authorities Board. Railway Express replied to this petition contending generally that there was an immediate and urgent need for its proposed service because of the discontinuance of certain train service between Washington, D. C., and Richmond, Va., and that the Board's order was in accordance with the evidence and applicable law.

By an order dated January 30, 1968, and served February 1, 1968 (Appendix D), the Commission's Division 1, acting as an Appellate Division, denied appellants' petition for reconsideration "for the reason that no showing has been made which would warrant a conclusion different from that reflected by the said order of December 7, 1967." Under the Commission's General Rules of Practice, appellants had exhausted their administrative remedies.

On May 17, 1968, appellants brought suit in the United States District Court for the Eastern District of Virginia to set aside the Commission's order granting the temporary authority, charging that the supporting shipper statements did not meet the requirements set forth in the Commission's rules and regulations in 49 C.F.R. § 1131.2 (c),[1] governing disposition of temporary authority applications under Section 210a(a). Defendants below in effect conceded that the Railway Express application did not fully comply with the Commission's rules. They claimed that there was "substantial compliance" and such was enough.[2]

In dismissing the complaint, the District Court discussed Items 8 and 9, only two of the 11 informational requirements set forth in the Commission's rules and regulations dealing with the content of supporting shipper statements. The court held that the information prescribed by Items 8 and 9, which require the supporting companies to indicate, "whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts," and "names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal," had been reason-

[1] The 11 informational requirements are set forth at pages 7-8 and in Appendix C.

[2] Government's Brief to the District Court, pp. 6-10; Railway Express's Brief, pp. 18-19.

ably answered.[3] It based its conclusion, in part, upon its understanding that appellants had not alleged that they hold themselves out to the public as providing the same coordinated, nationwide services for express as Railway Express (App. A, pp. 6-7). Accordingly, the court held that the Commission's grant of temporary authority to Railway Express was not arbitrary or capricious and dismissed the complaint.

THE QUESTIONS ARE SUBSTANTIAL

(a) The Need For Certainty

This case presents to the Court a question requiring definitive interpretation and application of the language of an important section of the Interstate Commerce Act and the Commission's rules and regulations dealing with such section. The precise question presented is whether the Commission is bound by its own regulations governing the issuance of temporary authority franchises to motor carriers under Section 210a(a) of the Interstate Commerce Act. There are in excess of 5,000 temporary authority applications filed each year with the Commission. This Court's final resolution of the questions presented will determine whether under the regulations involved the Commission may at its whim treat differently Railway Express from other motor carriers. While the gravity of

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[3] There were 11 "boiler plate" statements filed by supporting shippers and receivers and they all responded to the information required of Items 8 and 9 as follows:

> 8. I am currently obtaining the service I need from REA Express, and, accordingly, have had no occasion to seek express service from anyone else. Within my knowledge, however, no service other than that of R E A possesses all of the special characteristics required for adequate handling of my express shipments. If R E A service became unavailable, I would have an immediate and urgent need which no other carrier could meet.
>
> 9. Name and address of carrier filing application: Railway Express Agency, Incorporated, 219 East 42nd Street, New York, N. Y.

the situation generally may be sensed from the number of temporary authority applications processed annually by the Commission, the importance of the issues presented on this appeal can best be realized through a review of the history of the Commission's administration of Section 210a(a).

(b) History Of Section 210a(a)

Section 210a(a) provides that, "To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearing or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle as the case may be." The section povides further that such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of 180 days. Section 210a(a) was enacted by Congress in June, 1938 (52 Stat. 1238).

In the years following Congress's grant of power to the Commission to authorize temporary motor carrier operations, there was much confusion relating to temporary authority applications because of the absence of standards as to what would be acceptable to the Commission as establishing an immediate and urgent need for a temporary franchise. As a result, slipshod and even fraudulent practices developed in the processing of temporary authority applications. Cognizant of the many problems resulting from the absence of proper rules and regulations, the Commission, by notice and order entered November 5, 1964, had published in the *Federal Register* of November 18, 1964, proposed rules governing disposition of "temporary authority applications under Section 210a(a) of the Interstate Commerce Act"; and, thereafter, upon receipt of representations from a number of individual carriers, including Railway Express, carrier associations, and

others, adopted the proposed rules on April 7, 1965, and they became effective on July 1, 1965.

Issued in Ex Parte No. 67, 98 M.C.C. 183, and published at 49 C.F.R. 1131, the rules specify with particularity the content of statements filed in support of temporary authority applications. The paragraph immediately preceding the specification of various areas of information to be submitted states, *inter alia*, "each application for temporary authority *must* be accompanied by supporting statements * * *", and; "any such supporting statement must contain at least the following information" (emphasis added):

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known. (98 M.C.C. at 490-492; 49 C.F.R. 1131.2(c))

Inasmuch as the Commission elected to establish standards through a rule-making proceeding in the area of temporary authorities, motor carriers subject to the Commission's regulations understood these regulations to have the force and effect of law and that they, as well as the Commission, were bound by their terms.[4] See, *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942); *Service* v. *Dulles*, 354 U.S. 363 (1957); *Mississippi Valley Barge Company* v. *United States*, 252 F. Supp. 162 (E.D.Mo., 1966).

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[4] In this connection, the observation of Mr. Justice White in *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167 (1962) bears noting:

> Expert discretion is the lifeblood of the administrative process, but "unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion." New York v. United States, 342 U.S. 882, 884, 96 L.ed 662, 663, 72 S. Ct. 152 (dissenting opinion). "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body." Federal Communications Com. v. RCA Communications, Inc., 346 U.S. 86, 90, 97 L.ed 1470, 1475, 73 S. Ct. 998.

(c) The Questions Presented Require For Their Resolution Plenary Consideration With Briefs On The Merits And Oral Argument

The fundamental problem presented here is, as earlier stated, the significance of rules and regulations promulgated by the Commission in connection with its statutory authority in Section 210a(a) to grant temporary authority to motor carriers. This case has a number of aspects which, based upon prior decisions of this Court, justify the Court's taking jurisdiction. Those aspects are indicated below:

(1) There Is Conflict On The Questions Presented Between The 4th and 9th Circuits.

Customarily this Court has entertained cases from a lower federal court where it has been shown that the decision sought to be reviewed is in conflict with prior decisions of one or more other judicial circuits. Appellants contend that an analysis of the District Court's decision is in conflict or at least substantially inconsistent in theory with the decision of the United States District Court for the Western District of Washington, Southern Division, in *Acme Cartage Co., et al.* v. *United States*, Civil Action No. 3677, decided October 4, 1968, a copy of which is appended as Appendix E. The district court in Washington held that the rules promulgated by the Commission governing the content of statements filed in support of temporary authority applications are substantive rules and compliance with such rules is necessary in order to permit the Commission to exercise its discretion under Section 210a(a) and to reach the statutory finding whether an "immediate and urgent" need for the service proposed exists.

Until the decision by the District Court here, motor carriers seeking temporary authority under Section 210a (a) understood that in order to be successful their supporting shipper statements had to meet the Commission's

rules and regulations as set forth in 49 C.F.R. 1131.2(c); and this understanding conformed to the *Acme Cartage* decision. The Virginia District Court's decision is a radical departure from the industry's understanding of the scope and significance of the Commission's rules and regulations governing temporary authority and the decision of the Washington District Court. The Virginia Court's holding suggests that substantial compliance or partial compliance (to a degree determined not by the Commission but by the applicant) is enough to justify the Commission's grant of temporary authority. This is directly contrary to the District Court's decision in *Acme Cartage*.

(2) *The District Court's Decision Reverses Settled Administrative Construction*

Long-standing administrative construction by an agency charged with the enforcement of the statute questioned has been given great weight by the federal courts; and where a lower court has disagreed with administrative interpretation, this Court has frequently assumed jurisdiction for the purpose of returning certainty to the law. *Commissioner* v. *South Texas Lumber Company*, 333 U.S. 496, 499-500 (1948).

The Commission has recognized the essential purposes of the rules here and the vital importance of compliance with the very rule provisions involved in this case through past public pronouncements. For example, in the Commission's 79th Annual Report, it stated at page 39:

> On April 7, 1965, the Commission adopted new rules for the filing, processing, and determination of applications for motor carrier temporary authority, under section 210a(a) of the Interstate Commerce Act. The rules *require* more complete information to be furnished by carriers and shippers, and set forth *minimum standards* of proof necessary for a grant of temporary authority. (Emphasis added.)

That the requirements of the supporting shipper statements are more than guidelines is buttressed by a recent Commission public notice (Appendix F) wherein it made clear that the requirements of 49 C.F.R. 1131.2(c) are meant to be met.

(3) *Dispositive Action On The Questions Presented Will Tend To Lesson Further Litigation Before The Interstate Commerce Commission And The Federal Courts*

Railway Express claims to be the only nationwide[5] motor carrier of general commodities moving in express service, a position in transportation accepted by the District Court. This means that in any application for temporary authority by Railway Express, all it need do, under the District Court's decision, is have supporting shippers say they need nationwide express service and it is entitled to a grant of the authority. And since the District Court has held, in effect, that the supporting shipper statements do not have to meet all the requirements of 49 C.F.R. 1131.2(c), there is no way that carriers opposing the application can effectively test whether in fact there is an immediate and urgent need for Railway Express's proposed service. Thus, appellants hold authority to provide the service proposed between Washington, D. C., and Richmond, Va. But because the shippers claim that only Railway Express can provide the service and the District Court has said that they need not say any more, appellants are unable effectively to rebut the supporting shippers' claims of a need for the service.

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[5] Railway Express does not hold motor carrier authority to transport general commodities, moving in express service, throughout the United States. In fact, its motor carrier authority is generally concentrated east of the Mississippi River. It offers service to points beyond its motor carrier lines in connection with certain railroads, airlines, and motor carriers, including two appellants. Appellants and most other motor carriers also offer nationwide service by virtue of joint-line arrangements with other carriers.

Furthermore, in any instance where Railway Express seeks temporary authority, there is no way, in view of the District Court's decision, for general freight carriers to determine whether in fact there is a need for express service or whether general freight carriers can provide the service. Accordingly, the District Court's decision means that Railway Express is no longer subject to the requirements of Section 210a(a) and may be granted temporary authority on the basis of a bald pronouncement by a shipper that it immediately requires the service of Railway Express and without any obligation on the part of the shipper to first investigate what service is available.

In addition, a grant of temporary authority was held by the Court in *Pan-Atlantic S.S. Corp.* v. *Atlantic Coast Line R. Co.*, 353 U.S. 436 (1957), to be a license within the meaning of Section 9(b) of the Administrative Procedure Act (A.P.A.). Such a license establishes rights and obligations having substantial, practical, and legal consequences. Not the least of which is the subjection of vital revenues and traffic of existing carriers, including those of appellants, to the new competitive service thereby brought into being. The serious nature of these consequences is not ameliorated by the so-called "temporary" nature of the new service. Where, as here, the recipient of temporary authority has on file with the Commission an identical application for permanent authority (Docket No. MC-66562 (Sub-No. 2282)) grants of temporary authority, although ostensibly made for a period of 180 days are, in fact, continued in effect by the Commission under the provisions of Section 9(b) of the A.P.A. until determination of the corresponding application for permanent authority. See, Title 49 C.F.R. § 2.1. Applications for permanent authority have been in litigation before the Commission for many years; and judicial review can add one or more additional years, the temporary authority remaining in effect all the while. The consequence then is to permit an unneeded new competitive service to come into effect, not for the limited period of 180 days

as provided by statute, but for a period of years during the course of which appellants can be innocently victimized.[6]

The District Court's upholding of the Commission's grant of temporary authority is particularly onerous in the circumstances of this case. Railway Express's application for permanent authority corresponding to the temporary authority was filed with the Commission on December 12, 1968. To date the Commission has refused to publish the application in the *Federal Register*, even though appellants by a letter to the Commission on August 16, 1968 (Appendix G) inquired about the status of the application so that they might file a formal protest and have the proceeding set down for hearing. There was no response from the Commission. Thus, Railway Express operates under temporary authority, the Commission sits on its application for permanent authority, and appellants are blocked at every turn.

The decision of the District Court in carving out, as it does, a special status for Railway Express when seeking temporary authority, and the conflict in such decision with that of the Washington District Court is certain to invite further litigation both before the Commission and in the federal courts. Furthermore, litigation will not be restricted to questions arising under Section 210a(a), but will involve Section 207 which, as noted above, comes into play because a grant of temporary authority and the filing of a corresponding permanent authority application per-

---

[6] In one proceeding involving Railway Express, Docket No. MC-66562 (Sub-Nos. 1943, 1945, and 1948), styled *Railway Express Agency, Incorporated, Extension—Charleroi*, Railway Express filed applications for permanent authority in March and April 1963 corresponding to temporary authority previously granted. An examiner's report and recommended order were served April 17, 1967, and he recommended that the application be denied, except with respect to shipments weighing less than 1,000 pounds. That proceeding is still pending on exceptions before the Commission, and Railway Express continues to operate under temporary authority.

mits operations under the temporary franchises until final determination of the permanent application. Numerous complex legal problems are presented, therefore, by the District Court's decision.

In *Alcoa S. S. Co.* v. *U.S.*, 338 U.S. 421, 423 (1949), this Court stated:

> We granted certiorari because determination of the issue raised here will guide adjustment of a large body of similar claims now pending.

In similar circumstances, certiorari was granted in *Ludecke* v. *Watkins*, 335 U.S. 160, 162 (1948), where it was stated by the Court (footnote 2, page 162):

> We are advised that there are 530 alien enemies ordered to depart from the United States, whose disposition awaits the outcome of this case.

The foregoing cases[7] quite clearly indicate that the reason for fully considering the matters presented was that final resolution by the Supreme Court of the questions involved would tend to eliminate further litigation in the lower courts. Appellants submit that the Supreme Court, by fully disposing of the questions here present, will effectively check a substantial part of the litigation now anticipated under Sections 210a(a) and 207.

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[7] We recognize that in the *Alcoa* and *Ludecke* cases the Court's certiorari jurisdiction was invoked. However, the judicial policy appears to be the same on matters coming before the Court on direct appeal as evidenced by the *Drum*, *American Trucking Associations*, and *Frozen Food* cases, *supra*.

CONCLUSION

For the reasons stated, appellants submit that the questions presented by this appeal are of substantial public importance and warrant plenary consideration by this Court upon briefs and oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Harry J. Jordan, an attorney for the appellants and a member of the Bar of the Supreme Court of the United States, certify that a copy of the Jurisdictional Statement has been served by first-class mail, postage prepaid, upon the following parties: Hon. Erwin Griswold, Solicitor General, Hon. Edwin M. Zimmerman, Assistant Attorney General, and John H. D. Wigger, Attorney, Department of Justice, Washington, D. C. 20530; C. V. Spratley, Jr., United States Attorney, Alexandria, Virginia; Robert W. Ginnane, General Counsel, and Raymond M. Zimmet, Attorney, Interstate Commerce Commission, Washington, D. C. 20423; John C. Ashton, Vice President and General Counsel, and William H. Marx, Assistant General Counsel, Railway Express Agency, Incorporated, 219 East 42nd Street, New York, New York 10017; H. Merrill Pasco, Esquire, Hunter, Williams, Gay, Powell & Gibson, 700 East Main Street, Richmond, Virginia 23212.

Dated at Washington, D. C., this 4th day of March, 1969.

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 4821-A

ESTES EXPRESS LINES, ET AL.,
Plaintiffs,

-v-

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants,

and

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Intervenor Defendant.

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(Argued October 3, 1968. Decided Nov. 13, 1968)

Before BUTZNER, Circuit Judge, and Lewis and Kellam, District Judges.

BUTZNER, Circuit Judge:

The plaintiffs, motor carriers, seek to annul orders of the Interstate Commerce Commission granting the Railway Express Agency, Inc., temporary authority to operate as a motor carrier over regular routes transporting general commodities in express service between Washington, D. C., and Richmond, Virginia, including several intermediate off-route points.[1] Finding the Commission did not abuse its discretion, we dismiss the complaint.

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[1] On December 7, 1967, the Commission, by its Temorpary Authorities Board, granted REA 120-day temporary authority. Railway Express Agency, Inc., New York, New York, Docket No. MC 66562 SUB 2262 TA. On January 30, 1968, the Commission, by Division 1 acting as an Appellate Division, denied petitions for reconsideration.

For many years, REA used the Richmond, Fredericksburg & Potomac Railroad for express shipments between Washington, D. C., and Richmond, Virginia. After receiving notice that the R.F. & P. would discontinue less than carload express shipments over this route, REA applied for "emergency" authority and "temporary" authority under § 210(a) of the Interstate Commerce Act [2] to continue its shipments by truck over highways that generally parallel the R. F. & P's tracks. The Commission *ex parte* allowed REA to operate under emergency authority. Later, the Commission granted REA temporary authority pending determination of its application for a permanent certificate.

In support of its application for emergency and temporary authority, REA filed an affidavit of one of its officers and statements from eleven shippers. In its statement REA alleged that it offers nationwide express service with air, motor, boat, and surface connections, and that the proposed route was a necessary link in this nationwide system. It proposed that inbound traffic arriving at Washington and Richmond throughout the day and night would be accumulated and then transported in the early morning hours in time for same day delivery. Outbound shipments would depart originating points in the afternoon, allowing prompt connection with through trains, trucks,

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[2] Section 210(a) of the Interstate Commerce Act [49 U.S.C. § 310(a)] provides in part:

> "(a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter."

and planes at Washington and Richmond. The statement further alleged that REA had no knowledge of any carrier in the territory which had nationwide surface, air, motor, and other connections providing co-ordinated express services.

The protesting carriers did not allege that they held themselves out to the public as providing the same co-ordinated, nationwide services for express as REA. They alleged that they move commodities similar to REA's, that they can handle express shipments between Washington and Richmond, and that they interline with other carriers. They recognize REA's dual capacity as a carrier and a "consumer" of carrier services, and they emphasize that by interlining with REA they can provide the same service that was previously available.

The carriers principally complain that the shippers' statements in support of REA's application lack the particularity required by Commission regulations. Title 49 C.F.R. § 1131.2(c) requires each supporting statement to contain detailed information on the shipper's needs, including answers to the following:

> "(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.
>
> "(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal."

In answer to these questions, each shipper said:

> "I am currently obtaining the service I need from REA Express, and, accordingly, have had no occasion to seek express service from anyone else. Within my knowledge, however, no service other than that of REA possesses all of the special characteristics required for adequate handling of my express shipments. If REA service became unavailable, I would

have an immediate and urgent need which no other carrier could meet."

We do not agree that the Commission erred in considering these statements. Inquiries (8) and (9) of the regulations were reasonably answered when the shippers explained why they had made no effort to obtain express service from existing carriers. The statements were sufficiently particular to alert the Commission to the continuing shipping needs of the merchants. Furthermore, the Commission could consider the statements along with REA's supporting statement and in the light of the failure of the carriers to allege facts showing that they were providing transportation comparable in all respects to REA's.

In *Acme Cartage Co.* v. *United States*, Civil No. 3677 (W.D. Wash., Oct. 4, 1968), the supporting shippers' omission, without good cause, of answers to questions (8) and (9) was held to be fatal. That case, however, is inapposite. There both the applicants and the protestants were engaged in motor freight transportation, and the protestants held themselves out to the public as providing service identical to that proposed by the applicants. Also, the court emphasized that the information sought by inquiries (8) and (9) did not appear elsewhere in the record. Here lack of comparable service is indicated by the shippers' statements, REA's statement, and, indeed, can be inferred from the protest itself.

Finally, we conclude that the plaintiff's contentions that the Commission violated congressional policy against unrestricted railroad entry into the motor carrier field and that its orders are not supported by substantial evidence are premature. Section 210(a) of the Act "conceives a summary disposition of the application." *Alabama Great Southern R. Co.* v. *United States*, 103 F. Supp. 223, 226 (E.D. Va. 1952). The fact that REA had handled 141,696 express items during the period from August 1966 to July 1967 on the R. F. & P., the precipitous discontinuance of

railroad facilities, the lack of comparable motor service, and the continuing requirements of the shippers show an immediate and urgent need for REA's express service. Resolution of other issues may properly await a decision on REA's application for permanent authority.

The Commission's exercise of its discretionary authority was not arbitrary or capricious. The complaint is dismissed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 4821-A

ESTES EXPRESS LINES, ET AL.,
Plaintiffs,

-v-

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants,

and

RAILWAY EXPRESS AGENCY, INCORPORATED,
Intervenor Defendant.

FINAL ORDER

For the reasons stated in the opinion of the court this day filed,

It is ADJUDGED and ORDERED that the complaint and this action are dismissed.

Let the clerk send copies of this order and of the opinion to counsel of record.

/s/ JOHN D. BUTZNER, JR.
United States Circuit Judge

/s/ OREN R. LEWIS
United States District Judge

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

A True Copy, Teste:
W. Farley Powers, Jr., Clerk

By /s/ Doris R. Casey
Deputy Clerk

November 13, 1968.

APPENDIX B

TA-GR-B

SERVICE DATE: DECEMBER 14, 1967
CORRECTED ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Temporary Authorities Board, held at its office in Washington, D. C., on the 7th day of December, A. D. 1967.

NO. MC 66562 SUB 2262 TA
RAILWAY EXPRESS AGENCY, INCORPORATED
NEW YORK, NEW YORK

The above-entitled application under Section 210a(a) of the Interstate Commerce Act being under consideration, and

It appearing, That there is an immediate and urgent need for the motor carrier service described in the appendix hereto, and that there is no carrier service available capable of meeting such need:

It is ordered, That applicant be, and is hereby, granted temporary authority, conditioned upon full compliance with all applicable, statutory and Commission requirements concerning tariff publications, evidence of security for the protection of the public, and designation of agents upon whom process may be served, to engage in the business of transportation by motor vehicle, in interstate or foreign commerce, to the extent and in the manner set forth in the appendix hereto, subject to the further conditions that unless otherwise provided in the appendix, (1) the service herein authorized shall be limited to the movement of traffic which originates at and is destined to the points and areas specified in the appendix, and (2) no operating right separately described in the appendix may be combined with any other operating right therein described or with any other temporary or permanent au-

thority now held by, or hereafter issued to, applicant or any other carrier.

It is further ordered, That the service provided for in this order shall not be commenced until all requirements have been met and applicant has received notice from the Commission that compliance has been effected and service may be instituted.

It is further ordered, That upon the authority herein granted becoming effective, failure of applicant to render reasonably continuous and adequate service to the public pursuant thereto and to maintain compliance with statutory and Commission requirements shall constitute sufficient grounds for suspension, change, or revocation of the said authority.

It is further ordered, That if applicant fails to comply with all applicable statutory and Commission requirements, rules, and regulations within 30 days from the date hereof, or such additional time as the Commission may specifically grant, this order shall be of no further force and effect and the said application shall be deemed to be denied for want of prosecution and applicant so notified.

And it is further ordered, That except as herein granted the said application be, and it is hereby, denied.

By the Commission, Temporary Authorities Board.

/s/ H. Neil Garson
H. Neil Garson,
Secretary.

(SEAL)

OP-TA-12
(1966)

APPENDIX

TA-GR-B

NO. MC 66562 SUB 2262 TA *

RAILWAY EXPRESS AGENCY, INCORPORATED
NEW YORK, NEW YORK

By the order of which this appendix is a part, entered under the name and number shown above, applicant upon compliance with the conditions set forth therein and after receipt of notice from the Commission that the said conditions have been met, and provided the operations are begun within the time allowed in said order or any extension thereof, is authorized to engage in the business of transportation by motor vehicle, in interstate or foreign commerce as follows:

Time for which authority is granted—120 days commencing no sooner than December 14, 1967.

Type of carrier—Common
Service authorized—

General commodities, moving in express service, over regular routes,

Between Richmond, Va. and Washington, D. C., over Interstate Highway 95, serving the intermediate and off-route points of Newington, Woodbridge, Quantico, Fredericksburg and Ashland, and Milford, Va.

The service authorized herein is construed as an extension and may be joined and combined with carrier's authorized operations, in NO. MC 66562 and SUB numbers thereunder, thereby negating the restrictions set forth in the first ordering paragraph.

The service to be performed by applicant shall be limited to that which is auxiliary to or supplemental of express service of the Railway Express Agency.

Shipments transported by applicant shall be limited to those moving on through bills of lading or express receipts.

* This order served December 14, 1967, is to change the route description in the order served December 12, 1967.

NOTICE TO PARTIES: Special Rules of Practice Governing Procedure of the Temporary Authorities Board provide that petitions for reconsideration of the action of the said Board may be filed within 20 days following service of notice of such action. The Commission requires the original and six copies of each such petition filed and also a statement certifying that one copy thereof has been served on each party of record in the proceeding.

APPENDIX C

ISSUANCE OF CERTIFICATE

SEC. 207. [*August 9, 1935.*] [*49 U.S.C. § 307.*] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

TEMPORARY OPERATION OF MOTOR CARRIER PROPERTIES PENDING ACTION ON APPLICATION FOR CONSOLIDATION, MERGER, AND SO FORTH

SEC. 210a. [*June 29, 1938, amended September 18, 1940, March 27, 1942, June 29, 1946.*] [*49 U.S.C. § 310a.*] (a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract

carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

49 CFR 1131. *Temporary authority applications under section 210a(a) of the Interstate Commerce Act*

Section

1131.1 Controlling legislation and definitions
1131.2 Filing of applications.
1131.3 Processing of applications.
1131.4 Determination of applications.
1131.5 Rates, charges, and special permission applications.
1131.6 Petitions for reconsideration.

§ 1131.1 *Controlling legislation and definitions.*

(a) *Controlling legislation.*—Section 210a(a) of the Interstate Commerce Act, as amended, 49 U.S.C. 310a(a), which these rules and regulations are designed to implement, provides as follows:

> To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

Extensions of temporary authority beyond 180 days are governed by the special rules, contained in 49 CFR 2, promulgated pursuant to section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b).

(b) *Definitions.*—As used in these rules, the following words and terms are construed as follows:

(1) "Temporary authority".—Limited-term motor carrier operating authority issued for periods up to 180 days (TA) pursuant to section 210a(a) of the Interstate Commerce Act to authorize transportation service for which there is an immediate and urgent need and which cannot be met by existing carrier service. This term includes "emergency temporary authority" issued for periods of 30 days or less (ETA) to meet an immediate and urgent need for service due to emergencies, in which time or circumstances do not reasonably permit the filing and processing of an application for temporary authority (TA).

(2) "Common carrier by motor vehicle".—Same as defined in section 203(a)(14) of the Interstate Commerce Act (49 U.S.C. 303(a)(14)).

(3) "Contract carrier by motor vehicle".—Same as defined in section 203(a)(15) of the Interstate Commerce Act (49 U.S.C. 303(a)(15)).

(4) "Aggregate of 180 days".—The total number of days of temporary authority which may be granted to a motor carrier under the provisions of section 210a(a) of the Interstate Commerce Act to meet a continuing need for a particular service.

(5) "Person".—Same as defined in section 203(a)(1) of the Interstate Commerce Act (49 U.S.C. 303(a)(1)).

§ 1131.2 *Filing of applications.*

(a) *General.*—All temporary authority applications are filed at and initially processed by the Commission's field offices. The field staff of the Commission's Bureau of

Motor Carriers conducts preliminary investigations into applications for temporary authority and transmits the applications, with recommendations as to their disposition, to the Commission's Temporary Authorities Board in Washington, D. C. The Bureau's field offices maintain records of authorized carriers and their operating authorities, and its staff members are available for consultation and to give assistance in the obtaining of motor carrier service, and guidance in the preparation of temporary authority applications and related supporting material, and in making rate, insurance, and other required filings. The field offices will furnish copies of necessary forms upon request.

(b) *How and where filed.*—A separate application for each temporary authority sought must be filed on Form BOR-95 (49 CFR 7.95). The signed original and six copies of each application and all supporting documents must be filed with the Bureau of Motor Carriers' field office which has jurisdiction over the point at which applicant is domiciled, or such other field office as the Commission may designate in special circumstances.

(c) *Supporting statements.*—Each application for temporary authority must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense must contain a certification of its accuracy and must be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. Any such supporting statement must contain at least the following information:

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grand of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known.

(d) *Special procedures for filing applications for emergency temporary authority.*

(1) Emergency temporary authority should be applied for only where emergency conditions exist which do not permit sufficient time to afford the notice specified in § 1131.3(a). Applications for emergency temporary authority must be filed on Form BOR-95 (49 CFR 7.95).

(2) Where the emergency is found to continue beyond the period of the initial grant, the emergency temporary authority may be extended only upon written request until disposition is made of the longer term temporary authority application.

(3) In the case where the urgency of the situation warrants, the supporting statements of those having the immediate and urgent need for carrier service may be furnished by telegram. However, such telegram must contain substantially the factual information which is more fully described in paragraph (c) hereof. The telegram must be sent to the Bureau of Motor Carriers' field staff member who is handling the application.

(4) In processing emergency temporary authority applications, it often becomes necessary to use telephone and telegraph service to verify rate levels and the absence of existing carriers' service, and to submit the Bureau of Motor Carriers' field report to the Temporary Authorities Board in Washington, D. C. As Government funds are not available to pay such communications expenses, the applicant must have or make arrangements with the telephone and telegraph companies so that such costs can be charged to its account.

* * * *

§ 1131.3 *Processing of applications.*

(a) *Notice to interested persons.*

(1) *Service.*—Notice of the filing of temporary authority applications tendered shall be given by the publication

of a summary of the authority sought in the FEDERAL REGISTER, except that no such summary will be published in the case of emergency temporary authority applications. Such summaries will be prepared by the Bureau of Motor Carriers district supervisor and forwarded to the Bureau of Operating Rights, Washington, D. C.

(2) *Filing of protests.*—Any interested persons who can and will provide all or any part of the proposed service may file a protest against the application. Such protest must be specific as to the service which such protestant can and will offer and must consist of a signed original and six (6) copies which must be filed with the district suprevisor named in the FEDERAL REGISTER publication within 15 calendar days after the date notice of the filing of the application is published in the Federal Register. One copy of such protest must be served on the applicant or its authorized representative, if any, by U. S. mail or in person.

(b) *Publication of rates and charges.*—A carrier may not lawfully perform transportation under a grant of temporary authority unless and until compliance has been made with the rate and other requirements of section 217 of the Interstate Commerce Act in the case of common carriers and of section 218 of the act in the case of contract carriers, as provided in § 1131.5 hereof.

(c) *Revocation for noncompliance, and reinstatement and extension of time for making compliance.*—Temporary authority is approved subject to compliance within 30 days, or within such additional time as the Commission may approve, with the applicable provisions of the statute and the requirements, rules, and regulations prescribed by the Commission thereunder governing the filing of rate and contract publications; the filing of acceptable evidence of security for the protection of the public and designation of agents for service of process.

If compliance is not made within the 30-day period, or within the time allowed in any extension thereof appli-

cant will be notified that the temporary authority order is of no further force and effect. Where this occurs, applicant may make written request for reinstatement of the granting order if it so desires, provided (1) that such request is made within 20 days from the date of the notice, (2) that good cause can be shown as to why compliance was not made within the time allowed, and (3) that the request for reinstatement contains positive assurance that applicant is now able to and will comply immediately with all applicable requirements, if the order is reinstated.

§ 1131.4 *Determination of applications.*

(a) *General.*—Initial determination of temporary authority applications will be made by the Commission's Temporary Authorities Board or by Division 1 of the Commission, acting initially. But purposes of administration, distinctions in the applicable grounds of approval and rate filings will be maintained as between temporary authority of not more than 30 days (ETA), and temporary authority of up to 180 days (TA). No successive grants of temporary authority shall exceed a total of 180 days, and if grant of an emergency authority results in a total of aggregate temporary authority grants of more than 180 consecutive days, such total, to the extent that it exceeds 180 days, will be reduced accordingly.

While a grant of temporary authority is neither a permit nor a certificate under the Interstate Commerce Act it nevertheless enables the applicant to provide service either as a common or a contract carrier, as the case may be. Consequently, an applicant for temporary authority to operate as a motor contract carrier must show that the operation proposed is that of a contract carrier by motor vehicle as defined in section 203(a)(15) of the Interstate Commerce Act; that is, that the applicant serves one or a limited number of shippers, and that the service proposed involves either the assignment of vehicles to the supporting shipper's exclusive use or the provision of a

transportation service designed to meet the distinct needs of that shipper. No "dual operation" finding is necessary, however, where a grant of temporary authority to operate as a contract carrier is made to an existing common carrier and vice versa.

Since a grant of temporary authority is not a permit or certificate, none of the related rights, under the Interstate Commerce Act, such as the incidental charter rights of passenger carriers and the implied authority to perform terminal services at points within the commercial zone but beyond the corporate limits of named municipalities, is applicable. Temporary authority may not be tacked or joined with permanent authority held by the carrier for the purpose of performing through transportation, nor can through, joint-line service be performed thereunder. Where there is a need for such services which are not implicit in grants of temporary operating authority this fact should be stated specifically so that an appropriate authority description may be issued.

For administrative convenience, temporary authority to transport property will be considered to authorize the return transportation of shipper-owned trailers and of empty crates, barrels, bottles, hangers, pallets, bracing, dunnage, and other similar containers and shipping devices used in the outbound transportation covered by the temporary authority.

(b) *Standards for determination.*—The following standards shall be used by the Temporary Authorities Board, and by Division 1 of the Commission acting initially or in an appellate capacity, in the absence of special or unusual circumstances, in the determination under section 210a(a) of the Interstate Commerce Act (49 U.S.C. 310a (a)) of applications for temporary authority.

(1) *General.*—Grants of temporary authority shall only be made upon the establishment of an immediate and urgent need for the transportation of passengers, or

of particular commodities or classes of commodities, from specified origin points or areas to specified destination points or areas, having no carrier service capable of meeting such needs. Requests for temporary authority involving service to or from entire States, counties, or other defined areas will warrant approval only when supported by evidence that there is a compelling need for service to or from a representative number of points in each such State, county, or area, that there is a reasonable certainty that such service will be utilized, and that there is no carrier service available capable of meeting such need. Otherwise, such grants will be limited in accordance with the evidence to point-to-point authorizations covering the immediate and urgent need for service.

Any need which is the basis of an operation authorized by a temporary authority to be conducted for a period of less than an aggregate of 180 days is presumed not to be of a "continuing nature" unless the Commission otherwise expressly determines. If the need for a particular service ceases and a temporary authority covering such need expires or is revoked, and a new or separate need arises subsequent to such expiration or revocation, additional temporary authority for the 180-day aggregate, or for a shorter period, may be granted to the same carrier for the service, notwithstanding the prior grant or grants. However, an application filed after an aggregate of 180 days temporary authority has expired or been revoked will be denied unless the facts clearly show that the application is in reality based on a new need and not a continuation of the need on which the prior grant of authority was based.

(2) *Immediate and urgent need.*—An immediate and urgent need justifying a grant of temporary authority will be determined to exist only where it is established that there is or soon will be an immediate transportation need which reasonably cannot be met by existing carrier service. Such a showing may involve a new or relocated

plant, different method of distribution, new or unusual commodities, an origin or destination not presently served by carriers, a discontinuance of existing service, failure of existing carriers to provide service, or comparable situations which require new motor carrier service before an application for permanent authority can be filed and processed.

(3) *Emergency temporary authority.*—An immediate and urgent need justifying a grant of emergency temporary authority will be determined to exist only where it is established that existing carrier service is not capable of providing transportation service to meet immediate and actual emergencies, such as, for example, to prevent a plant shutdown, to move particular shipments in the interest of the national defense, to meet needs resulting from fires, floods, storms, or other disasters which affect the public health, safety, and welfare, disruption in existing carrier services by work stoppages, unexpected cessation of existing transportation service, lack of equipment capable of transporting the involved commodity, failure or lack of storage facilities and imminent spoilage of perishable commodities, or comparable situations which make it impracticable to afford the notice specified in §1131.3(a).

(4) *Single-line service.*—Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority. A grant of temporary authority to effecuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in, meeting the reasonable immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved.

(5) *Complete service.*—Requests for temporary authority on the basis of "providing a complete service to a

shipper," even though existing carriers are participating in the traffic and in many instances can provide a substantial part of the service, require special justification. Generally, in such instances, the applicant must establish with reasonable certainty that the existing carriers cannot adequately serve the shipper in their authorized territories, or that the supporting shipper has revised its distribution methods to such an extent that there actually is an immediate and urgent need for the complete service proposed.

(6) *Failure to provide equipment.*—Temporary authority may be granted where existing authorized carriers are unable or refuse to furnish equipment necessary to move passengers or the traffic of shippers in order to meet an immediate and urgent transportation need.

(7) *Alternate routes.*—Except in unusual circumstances, temporary authority to operate over an alternate route will not be granted, even though the service route may be circuitous, since the carrier-applicant may now operate between the points involved.

(8) *General bases for disapproval.*—Applications for temporary authority may be denied for the following reasons:

(i) Failure to meet statutory standards.

(ii) Unfitness of the applicant.

* * * * *

§ 1131.6 *Petitions.*

(a) *Petitions for reconsideration.*—Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions for reconsideration of orders of (1) the Temporary Authorities Board, and (2) Division 1 initially granting or denying temporary authority in proceedings not subject to prior determination by the Temporary Authorities Board, may be filed by any interested person.

(b) *Replies.*—Replies may be filed by any interested person to such petitions; but if the facts stated in any such petition disclose a need for accelerated action, such action, in the discretion of the Commission, may be taken before expiration of the time allowed for reply. Replies received after accelerated action on petition will be treated as petitions for reconsideration of the accelerated action and given corresponding accelerated action.

(c) *Petitions for reconsideration.*—The filing of a petition for reconsideration of an order of Division 1 or the Temporary Authorities Board does not have the effect of automatically staying such order, and the grantee carrier may conduct the operations authorized by such order upon compliance with its tariff, insurance, and other requirements for the duration of the temporary authority, or until otherwise ordered.

It is further ordered, That this order shall become effective on July 1, 1965, and shall remain in effect until modified or revoked, in whole or in part, by further order by the Commission;

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the Office of the Secretary of the Interstate Commerce Commission, Washington, D. C., and by filing a copy with the Director, Office of the Federal Register.

[52 Stat. 1237, 49 U.S.C. 304(a)6; 52 Stat. 1238, 49 U.S.C. 310a(a); 49 Stat. 560, 49 U.S.C. 317; 49 Stat. 561, 49 U.S.C. 318; 60 Stat. 237, 5 U.S.C. 1003 and 1008.]

By the Commission.

APPENDIX D

SERVICE DATE: FEBRUARY 1, 1968 ORDER D-370

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, acting as an Appellate Division, held at its office in Washington, D. C., on the 30th day of January, 1968.

NO. MC 66562 SUB 2262 TA

RAILWAY EXPRESS AGENCY, INCORPORATED
NEW YORK, NEW YORK

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Joint petition of Estes Express Lines, et al., and petition of Hemingway Transport, Inc., protestants, filed December 27, 1967, and January 2, 1968, respectively, for reconsideration of the order of the Commission, Temporary Authorities Board, dated December 7, 1967, granting temporary authority herein;

(2) Reply by applicant filed January 15, 1968;

and good cause appearing therefor:

It is ordered, That said petitions be, and they are hereby, denied for the reason that no showing has been made which would warrant a conclusion different from that reflected by the said order of December 7, 1967.

By the Commission, Division 1, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

Civil Action No. 3677

ACME CARTAGE CO.; ASBURY TRANSPORTATION CO.; BEST WAY MOTOR FREIGHT, INC.; BLACK BALL FREIGHT SERVICE; EDMONDS-ALDERWOOD AUTO FREIGHT COMPANY; GARRETT FREIGHT-LINES, INC.; HOGLAND TRANSFER COMPANY; INLAND TRANSPORTATION CO., INC.; INTER-CITY AUTO FREIGHT, INC.; JAMES J. WILLIAMS, INC.; LOS ANGELES-SEATTLE MOTOR EXPRESS, INC.; NATIONAL TRANSFER, INC.; GUS VANDERPOL and HENRY VANDERPOL, DOING BUSINESS AS OAK HARBOR FREIGHT LINES; OREGON-NEVADA-CALIFORNIA FAST FREIGHT, INC.; PENINSULA TRUCK LINES, INC.: RALPH POZZI, CARL A. POZZI, CLINTON D. POZZI and WAYNE POZZI, DOING BUSINESS AS POZZI BROS. TRANSPORTATION COMPANY; RENTON-ISSAQUAH AUTO FREIGHT, INC.; SILVER EAGLE COMPANY; TACOMA MOVING & STORAGE CO.; VALLEY MOTOR LINES, INC.; WALLACE-COLVILLE MOTOR FREIGHT, INC.; UNITED-BUCKINGHAM FREIGHT LINES, PLAINTIFFS,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

D. W. RAMSEY MOTOR FREIGHT, INC.; FEDERAL TRANSFER CO., INC.; SNIDER TRUCKING SERVICE, INC.; and WESTERN CARTAGE, INC., INTERVENORS

OPINION

Before HAMLEY, Circuit Judge, and BODLT and GOODWIN, District Judges.

BOLDT, District Judge:

Plaintiff motor freight carriers operating in the State of Washington brought this action to set aside an annul orders of the Temporary Authorities Board of the Interstate Commerce Commission (hereafter ICC), granting temporary authorities under Section 210a(a) ICC Act, 49 U.S.C. 310a(a), to seven non-certified motor freight carriers operating within the State of Washington.[1] "Grandfather" certificates of registration granted to the seven carriers by ICC were held invalid in *Blackball Freight Service* v. *United States*, 266 F. Supp. 287 (WD Wash SD, 1967). Pursuant to that decision, ICC cancelled the certificates. Thereafter the seven carriers filed applications for temporary authority to continue the service previously provided under the cancelled certificates. Notice of the temporary authority applications appeared in the Federal Register and protests were duly filed by plaintiffs. The ICC Board found there was urgent and immediate need for the services for which authority was sought by the applicants and temporary authority to provide the service was granted by orders dated between July 20, 1967 and October 16, 1967.

As authorized by the ICC Act, after extended consideration the ICC adopted Temporary Authority Rules, effective July 5, 1965, specifying procedures for the submission and determination of temporary authority applications under

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[1] Interstate Commerce Act, Section 210a(a), as amended, 49 U.S.C. 310a(a), provides:

> "To enable the provision of service for which there is an *immediate and urgent need* to a point or points within a territory having *no carrier service capable of meeting such need*, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter." (Emphasis added).

Section 210a(a) ICC Act. Ex Parte No. MC-67, 49 CFR 1131. The rules specifically provide in mandatory terms that each filed temporary authority application must be accompanied by one or more supporting statements and each such statement must contain at least the information specified in eleven categories.[2] Two of those are:

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[2] Ex Parte No. MC-67, 49 CFR 420.2, 49 CFR 1131.2, provides:

"(b) How and Where filed. A separate application for each temporary authority sought must be filed on Form BOR-95 (§ 1003.1 of this chapter). The signed original and six copies of each application and all supporting documents *must be* filed with the Bureau of Operations Field Office which has jurisdiction over the point at which applicant is domiciled, or such other field office as the Commission may designate in special circumstances.

"(c) Supporting Statements. *Each application for temporary authority must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers,* except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense, must contain a certification of its accuracy and must be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. *Any such supporting statement must contain at least the following information:*

(1) Description of the specific commodity or commodities to be transported. (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

[Footnote continued on page 45]

"(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

"(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal."

Plaintiffs assert that not a single one of the supporting letters accompanying the temporary authority applications of the seven carrier applicants provided the information required by either of the two above quoted rule provisions. Plaintiffs contend that granting of the temporary authorities in question without a showing of the required information was arbitrary, capricious and erroneous in law. At argument, counsel for defendants conceded that the required information was not contained in any of the supporting letters. Intervenors (four of the seven applicants) contended otherwise and, with leave, after argument filed a memorandum in support of their contention which the court has fully considered. The defendants and Intervenors contend the Temporary Authority Rules are merely "guidelines" for ICC action and not to be construed as

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[2] [Continued]

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made no obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known." (Emphasis added.)

limiting the broad discretion of ICC in granting temporary authorities pursuant to Section 210a(a) of the ICC Act. Also, they urge that any failure of the ICC to enforce its rules in the particulars above referred to does not show the action taken upon the temporary authorities in question was arbitrary, capricious or unlawful.

Contrary to the suggestion of defendants and Intervenors, we find and hold it unmistakably clear that neither the term "carrier service" in Section 210.2(a) of the ICC Act nor the term "existing carrier", as used in § (8) and § (9) of 1131.2(c) above quoted, refers to services by applicants for temporary authority to provide the needed services in question. Therefore, the requirement of information pertaining to "existing carriers" in the above quoted regulations is not satisfied by supporting statements concerning service by the applicant "grandfather" carriers.

From our examination of the supporting letters attached to each of the applications in question, we find none of them approaches compliance with, or provides the information required by, either § (8) and § (9) above quoted. We do not find the information specified in those sub-sections otherwise shown or referred to of record in the present case.

Under sub-section 1131.3(a)(2) of the Temporary Authority Rules, any interested carrier who can and will provide all or any part of the proposed service for which temporary authority is sought may protest against temporary authority applications to provide such service.[3] Any such protest must state the specific service the protestant can and will offer to shippers needing the service. There is no indication ICC questioned the sufficiency of plaintiffs' protests and they are not challenged in this case.

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[3] "1131.3(a)(2) Filing of Protests. Any interested persons who can and will provide all or any part of the proposed service may file a protest against the application. Such protest must be specific as to the service which such protestant can and will offer . . ."

If any shipper, whether or not it submitted a letter in support of any temporary authority application in question, made reasonable inquiry as to the identity of carriers certified to provide the needed service within the territory in question, or specifically requested any plaintiff carrier to provide the needed service at any time and particularly during the period between the cancellation of the licenses of applicants and the filing of their applications for the temporary authorities in question, there is no evidence or indication thereof in the record before this court. At most, the supporting letters state a preference of the letter writers for continuance of service by the applicants. It is clear to us the mere preference of shippers to use non-certified carriers for needed service does not indicate and certainly does not establish that carriers certified by ICC to operate within the territory in question are not capable of providing the needed service.

By its terms, 49 U.S.C. 310a(a) vests discretion in ICC to grant temporary authority for motor carrier services only when both of the two conditions specified in the statute are shown, i.e. (1) "an immediate and urgent need for service" (2) "within a territory having no carrier service capable of meeting such need." When both conditions exist, the statute provides for wide latitude in the exercise of the discretion ICC may exercise in granting temporary authority applications. However, before ICC can exercise that discretion it is clear from the language of the statute that concurrent existence of both conditions (1) and (2) is mandatory and absent either one of the conditions ICC has neither power nor discretion to grant temporary authority applications.

As recited in the Temporary Authority Rules, they are "designed to implement the statute." Nothing in the Rules is more basic or important to that purpose than the provisions designed to aid in fair and sound determination of the statutory conditions mandatorily required for the exercise of either power or discretion by the ICC in

granting temporary authority.[4] Obviously, the information required by § (8) and § (9) bears directly and specifically on one of those two conditions, i.e. whether the urgently needed service can and will be provided by existing certified carriers. Enforcement of reasonable compliance with these particular provisions appears desirable in

---

[4] The essential purposes of the rules and the vital importance of compliance with the very rule provisions involved in this case has been recognized by ICC itself. The following ICC policy release was issued January 23, 1968:

"POLICY CLARIFIED FOR ICC ACTION ON APPLICATIONS FOR TEMPORARY AUTHORITY TO CONDUCT MOTOR CARRIER OPERATIONS.

"Requests for temporary authority to conduct regulated motor carrier service will be turned down if the applications do not adequately comply with Interstate Commerce Commission rules.

"The clarified policy will be administered by Division 1, which handles operating rights matters.

"The Commission adopted this policy upon receiving recommendation from the Division because of the haphazard preparation of many of the more than 5,000 applications for temporary authority received annually. Most of the requests involve common carrier trucking. The applications usually result from an emergency or short term need of shippers, or when new products and commodities are developed and require immediate transportation services.

"*Because of 'slip-shod' preparation of many of the applications, the Division frequently has found it difficult to reach an informed and equitable decision.* Further investigation by the ICC staff often has been required in order to obtain necessary information. *Foremost among the complaints in this area are those concerning failure of the applicant or his representative to submit supporting statements which contain all of the information required by Section 240.2(c) of the Temporary Authori- Rules.* These rules are set forth in Ex Parte No. MC-67, Motor Carrier Temporary Authorities; 98 M.C.C. 483, and 49 CFR 1131 (formerly 49 CFR 340).

"According to the clarified policy, Division 1 will deny temporary authority applications in which, because of non-compliance with the rules, a fair adjudication is not possible on the record before the Commission, without prejudice, however, to the filing of a new application conforming to the rules." (Emphasis added)

regular practice but their enforcement is essential when, as in this case, several certified protestants have asserted ability and willingness to provide the needed carrier service in question and evidence to the contrary is not shown of record. Variable and unpredictable enforcement of important and mandatorily stated rule provisions is inequitable in principle and unsound in practice. If particular rules prove over rigid or otherwise unsatisfactory in practice they can be amended as experience dictates. *Service* v. *Dulles*, 354 U.S. 363 (1957); *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407 (1942).

Having adopted Rules emphatically requiring temporary authority applicants to provide the essential information specified in § (8) and § (9), we find it capricious and arbitrary for ICC, without good cause shown, to ignore or waive compliance with these critically important rule provisions. At a minimum, we find it so when the essential information § (8) and § (9) require to be provided does not appear elsewhere in the record.

For the reasons stated, it appears as a matter of law that the temporary authorities in question were erroneously granted and that each of them should be and hereby is held null and void.

IT IS SO ORDERED.

DATED this 4th day of October, 1968.

/s/ FREDERICK G. HAMLEY
FREDERICK G. HAMLEY
United States Court of
Appeals Judge

/s/ GEORGE H. BOLDT
GEORGE H. BOLDT
United States District Court
Judge

/s/ WILLIAM N. GOODWIN
WILLIAM N. GOODWIN
United States District Court
Judge

APPENDIX F

INTERSTATE COMMERCE COMMISSION
Washington, D. C. 20423

737-9765 Ext. 350

15-68

FOR RELEASE:

Tuesday, January 23, 1968
9:30 a.m.

POLICY CLARIFIED FOR ICC ACTION ON APPLICATIONS FOR TEMPORARY AUTHORITY TO CONDUCT MOTOR CARRIER OPERATIONS

Requests for temporary authority to conduct regulated motor carrier service will be turned down if the applications do not adequately comply with Interstate Commerce Commission rules.

The clarified policy will be administered by Division 1, which handles operating rights matters.

The Commission adopted this policy upon receiving recommendation from the division because of the haphazard preparation of many of the more than 5,000 applications for temporary authority received annually. Most of the requests involve common carrier trucking. The applications usually result from an emergency or short term need of shippers or when new products and commodities are developed and require immediate transportation services.

Because of "slip shod" preparation of many of the applications, the division frequently has found it difficult to reach an informed and equitable decision. Further investigation by the ICC staff often has been required in order to obtain necessary information. Foremost among the complaints in this area are those concerning failure of the applicant or his representative to submit supporting

statements which contain all of the information required by Section 240.2(c) of the Temporary Authority Rules. These rules are set forth in Ex Parte No. MC-67, *Motor Carrier Temporary Authorities*, 98 M.C.C. 483, and 49 C.F.R. 1131 (formerly 49 C.F.R. 340).

According to the clarified policy, Division 1 will deny temporary authority applications in which, because of non-compliance with the rules, a fair adjudication is not possible on the record before the Commission, without prejudice, however, to the filing of a new application conforming to the rules.

APPENDIX G

August 16, 1968

The Honorable H. Neil Garson
Secretary
Interstate Commerce Commission
Washington, D.C. 20423

Re: Docket No. MC-66562 (Sub-No. 2282), Railway Express Agency, Incorporated

Dear Mr. Garson:

Our firm represents a number of motor carriers which are seeking to have enjoined and annulled a grant of temporary authority to Railway Express in Docket No. MC-66562 (Sub-No. 2262 TA). A court proceeding for this purpose has been instituted in the United States District Court for the Eastern District of Virginia, *Estes Express Lines, et al.* v. *United States of America, et al.*, Civil Action No. 4821-A.

I have been advised that on December 12, 1968, Railway Express filed an application for corresponding permanent authority. According to the Commission's files and telephone conversations with the office of Mrs. Virginia K. Coulter, Certificates and Captions, the application has not been published in the *Federal Register*. Our clients desire to protest the application for permanent authority and to ask for oral hearing for the purpose of showing that no public need exists for the proposed service. However, since the application has not been published in the Federal Register, they are unable to file a protest and must continue to scan the *Federal Register* in the expectation that the application will be published. This causes much inconvenience and apprehension on the part of our clients that the application may for some reason escape notice. In addition, the failure of the Commission to publish this application in the *Federal Register*

places our clients in the position of having competition from Railway Express under temporary authority, which, by operation of law, continues in effect until the disposition of the permanent application.

We would appreciate it, therefore, if the Commission would advise us when the Railway Express application for permanent authority will be published in the *Federal Register* and when, if oral hearing is requested and granted, this matter can be reasonably expected to be heard.

Very truly yours,

HARRY J. JORDAN

HJJ:tmh

cc: Mr. William H. Marx
Counsel for Railway
Express Agency

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1121

ESTES EXPRESS LINES ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. 17–23, reported at 292 F. Supp. 842) dismissing an action brought to set aside certain orders of the Interstate Commerce Commission (J.S. 24–27; 41). Those orders granted temporary authority to Railway Express Agency, Inc. (REA), pursuant to Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. 310a(a), to operate as a

338-571—69

motor common carrier transporting general commodities in express service over regular routes between Washington, D.C., and Richmond, Virginia.[1] This temporary motor authority is limited to operations auxiliary to or supplemental of REA's express service (J.S. 26).

The facts in this case are undisputed. For years, REA, an express company subject to Part I of the Interstate Commerce Act, 49 U.S.C. 1(3)(a),[2] used the Richmond, Fredericksburg & Potomac Railroad as an underlying carrier for express shipments between Washington, D.C. and Richmond. Upon receiving notice that the Railroad would soon discontinue handling less-than-carload express shipments over this route, REA applied to the Commission for temporary authority to continue its express shipments by truck over highways generally paralleling the Railroad's tracks. See 49 C.F.R. 1131.2–1131.4. REA averred that the route was a necessary link in its nationwide express system and that no other carrier to its knowledge provided such service. The application was supported by eleven shippers, each declaring its current use of REA's express service in the area involved and its continuing need therefor. Each shipper stated that, in its opinion, no service other than REA's possessed all of the special characteristics required for the adequate handling of its express shipments, so that discontinuance of REA's service would create an im-

[1] REA is also temporarily authorized thereby to serve six specific intermediate and off-route points located between Washington, D.C. and Richmond (J.S. 26).

[2] See also 49 U.S.C. 303(a)(9), 303(a)(14), 902(d).

mediate and urgent need which no other carrier could meet.

Protests to the application were filed by the appellants, general motor freight carriers. They contended that it was unnecessary to grant temporary motor authority to REA because they could perform the same type of express service if REA were willing to tender express shipments to them between Washington, D.C. and Richmond. They suggested that they could interline shipments with other carriers to move commodities throughout the country, but did not show that they were able to provide coordinated, nationwide express service. Appellants also alleged that the Commission was obliged to deny REA's application because the shippers' statements in support thereof lacked the particularity required by the Commission's regulations. See 49 C.F.R. 1131.2(c).

The Commission's Temporary Authorities Board, an employee board, granted REA's application, finding that there was an immediate and urgent need for service and that no available carrier was capable of meeting the need (J.S. 24). Appellants' petitions for reconsideration were denied by Division 1 of the Commission, acting as an Appellate Division (J.S. 41).

Subsequently REA applied for permanent motor authority corresponding to its temporary authority, and the Commission has extended the temporary authority pending the outcome of the permanent application proceeding. See 49 C.F.R. 1101.1; *Pan-Atlantic S.S. Corp.* v. *Atlantic Coast Line R.R.*, 353 U.S. 436.

The three-judge court below unanimously affirmed the grant of temporary authority, holding that the

administrative record showed the appellants were not providing an express transportation service comparable in all respects to REA's (J.S. 21). The court also held that the Commission had properly considered the shippers' supporting statements, which adequately alerted the Commission to their continuing needs for REA's nationwide express service (J.S. 20–21).

ARGUMENT

Appellants' principal contention here (J.S. 5–8), as it was below, is that the Commission was required as a matter of law to reject REA's application because the statements of shippers supporting the application did not literally conform to the Commission's temporary authority regulations. Specifically, the regulations require that supporting shippers indicate whether efforts have been made to obtain the needed service from existing carriers, and the results of such efforts (49 C.F.R. 1131.2(c) (8)–(9), quoted at J.S. 7–8). Each of the shippers supporting the REA application stated that it was currently obtaining the needed service from REA and had no knowledge of any carrier other than REA that could offer adequate express service (J.S. 5, n. 3).

Appellants' argument, in the circumstances of this case, exalts form over substance and the court below properly rejected it (J.S. 20–21). The court noted that the Commission could consider the shippers' statements together with REA's statement and the statements of appellants themselves, which failed to allege facts to show that they were providing service comparable to REA's. Moreover, the courts and the Commission have repeatedly recognized the differences between

the express service performed by carriers such as REA and the ordinary freight service performed by general commodities motor carriers, such as appellants. *Auclair Transportation, Inc.* v. *United States,* 221 F. Supp. 328, 332–333 (D. Mass.), affirmed *per curiam,* 376 U.S. 514; *REA Extension—Nashua, N.H.,* 91 M.C.C. 311, 324, 340–341; *Transportation Activities of Arrowhead Freight Lines,* 63 M.C.C. 573, 579–583; *Mistletoe Express Service Extension—Texas,* 61 M.C.C. 737, 744–745; *REA Extension—Durant-Kosciusko,* 34 M.C.C. 111, 114. Thus, the court below was correct in holding that, in the light of the record as a whole, Inquiries (8) and (9) of the regulations were "reasonably answered" (J.S. 21).[3]

Since only temporary authority is involved here, the Commission's decision is merely a preliminary determination designed to maintain the existing express service for the time being. Whether REA will be authorized under Section 207 of the Act, 49 U.S.C. 307, to operate permanently as a motor carrier in the area involved must await Commission resolution of REA's pending application.[4] Appellants are entitled to par-

[3] In *Acme Cartage Co.* v. *United States,* 290 F. Supp. 453 (W.D. Wash.), existing carriers already provided a service identical to that proposed by applicants for temporary authorities, and there was no other evidence elsewhere in the record to justify a Commission grant. The court below found *Acme Cartage* to be "inapposite" (J.S. 21). Because of the factual distinctions this case and *Acme Cartage* do not represent a "conflict * * * between the 4th and 9th Circuits," as appellants suggest (J.S. 9–10).

[4] Contrary to appellants' assertions (J.S. 13), the Commission has published REA's permanent authority application in the *Federal Register* (33 Fed. Reg. 17502, 17513), and is actively processing that application.

ticipate in that permanent application proceeding and thereafter to seek judicial review of any adverse final action. As the court below concluded (J.S. 21–22), any other contentions concerning REA's operations as a motor carrier are premature at this time and must properly await a decision on its application for permanent authority.

CONCLUSION

The judgment of the court below should be affirmed.
Respectfully submitted.

ERWIN N. GRISWOLD,
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Interstate Commerce Commission.

APRIL 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

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Supreme Court of the United States

October Term, 1969

No. 1121

ESTES EXPRESS LINES, ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and RAILWAY EXPRESS AGENCY, INCORPORATED,

Appellees.

MOTION TO AFFIRM OF APPELLEE, RAILWAY EXPRESS AGENCY, INCORPORATED

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1121

ESTES EXPRESS LINES, ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND RAILWAY EXPRESS AGENCY, INCORPORATED,

Appellees.

MOTION TO AFFIRM OF APPELLEE, RAILWAY EXPRESS AGENCY, INCORPORATED

Appellee, Railway Express Agency, Incorporated (REA), Intervenor Defendant in the proceedings below, moves this Court pursuant to its Rule 16 to affirm the judgment of the special three-judge district court on the ground that the questions are so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court dismissing an action brought to set aside (1) an order of the Interstate Commerce Commis-

sion (Commission), by its Temporary Authorities Board, dated December 7, 1967, granting 120-day temporary authority to REA to operate in interstate commerce as a common carrier by motor vehicle, auxilliary to or supplemental of its express service, carrying general commodities moving in express service between Washington, D. C. and Richmond, Virginia and six intermediate or off-line points, and (2) an order of the Commission, by Division 1, acting as an appellate division, dated January 30, 1968 denying appellants' petition for reconsideration and affirming the Commission's order of December 7, 1967.[1]

There is no dispute as to the facts in the case. Pursuant to notice given REA on September 5, 1967, the Richmond, Fredericksburg and Potomac Railroad Company (RF&P) on October 15, 1967 discontinued its handling of less-than-carload express shipments between Washington and Richmond, Virginia, including the intermediate and off-line points referred to above. Upon discontinuance of this service there remained no rail service on which express traffic handled by REA could be transported between Washington and Richmond and the intermediate and off-line points involved, and REA was without a vital link in its coordinated nationwide express service.

In order to insure the uninterrupted continuance of express service to and from these points comparable to that provided before the rail service was discontinued, for which there was an immediate and urgent public need, REA promptly sought emergency temporary authority pursuant to 49 U.S.C. 310a(a) and 49 C.F.R. 1131.2(d) to operate by motor vehicle on a regular schedule over the proposed

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[1]The opinion of the three-judge court is reported at 292 F. Supp. 842 and is contained in Appendix A of the Jurisdictional Statement (hereafter J.S.) at page 17.

route until application for temporary authority could be filed and acted upon pursuant to 49 U.S.C. 310a(a) and 49 C.F.R. 1131.2(a).[2]

On October 5, 1967 the Commission granted REA 30-day emergency temporary authority effective October 15, 1967, which was later extended for an additional 30 days until December 14, 1967. This emergency temporary authority was further extended for 30 days commencing December 15, 1967.

On October 30, 1967 REA applied to the Commission for 120-day temporary authority to continue to operate over this route pending the filing of an application for permanent authority.[3] This application was signed and verified by REA's Vice President and contained a detailed statement of REA's operation and the need for the operating rights for express service by motor vehicle between Richmond and Washington. The application stated that REA had no knowledge of any carrier in the territory which had nationwide surface, air, motor, and other connections providing coordinated express service. The application was supported by statements from ten shippers and one merchants association setting forth their need for the express service which had been provided by REA through its use of the rail service of the RF&P and which to their knowledge could not be provided by any other carrier.

Appellants filed protests to the grant of the authority sought by REA, but on December 7, 1967 the Commission granted the application for temporary authority which became effective December 26, 1967. The Commission found

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[2]49 U.S.C. 310a(a) and 49 C.F.R. 1131 are reproduced in Appendix C, J.S. 28-40.

[3]Notice of the filing of the application was published in the *Federal Register* on November 7, 1967, Vol. 32 at page 15515.

that REA had established an immediate and urgent need, as required by law, for the temporary service proposed (J.S. 24-26). On December 27, 1967 appellants sought reconsideration by the Commission of the order granting the temporary authority to REA. On January 30, 1968 the Commission denied appellants' petition for reconsideration for the reason that "no showing has been made which would warrant a conclusion different from that reflected by the said order of December 7, 1967" (J.S. 41). On March 20, 1968 REA was advised by the Commission that the temporary authority was continued until further order of the Commission pending disposition of the corresponding application for permanent authority which was filed with the Commission by REA on December 11, 1967.

On May 17, 1968 appellants filed their complaint in this proceeding seeking a permanent injunction against the Commission's orders of December 7, 1967 and January 30, 1968, alleging that they were unlawful since they granted temporary authority in the absence of a proper showing of an immediate and urgent need in an area where existing motor carrier service was available. Appellants' principal complaint was that the supporting statements of shippers filed by REA failed to meet in every particular the specific requirements of the Commission's rule as to such statements (49 C.F.R. 1131.2(c))[4] and that therefore, as a matter of law, the Commission was bound to deny the application.

The Commission's grant of temporary authority to REA was unanimously affirmed by the three-judge district court on November 18, 1968 holding that the Commission's discretionary power to grant such temporary authority was supported by the record and had not been exercised arbitrarily or capriciously. It found that appellants were not

[4]See J.S. 31 for the text of the rule.

providing express service comparable in all respects to that provided by REA; that appellants had failed to allege facts showing they were providing such service; and that the shipper statements filed by REA in support of its application were properly considered by the Commission since they met the requirements and fulfilled the purpose of the Commission rule with respect to such statements.

ARGUMENT

The decision of the district court is plainly correct and appellants present no substantial question for the decision of this Court. The questions presented by appellants involve nothing more than the highly technical argument that the Commission is bound by its rules as to what supporting shipper statements must set forth, and that the alleged failure of the supporting statements to comply with such requirements in every particular required the Commission as a matter of law to deny the application for temporary authority (J.S. 2-3). Appellants erroneously assert that there is a conflict on this question between the Fourth and Ninth Circuits; that the district court's decision reverses settled administrative construction; and that a final resolution of the question will tend to lessen further litigation before the Commission and the federal courts. There is no basis for these assertions.

1. The Supporting Shipper Statements

The Commission is vested with broad discretionary authority under 49 U.S.C. 310a(a) to grant temporary authority to provide motor carrier service "without hearings or other proceedings" where there is an immediate and urgent need for such service in a territory where there is no carrier capable of providing such need. It has promulgated rules for the filing and processing of applications for

such temporary authority. One of these rules requires that such applications be supported by shipper statements containing eleven items of information, 49 C.F.R. 1131.2(c).

This rule specifying the contents of shipper statements was intended to assist the Commission in making a fair adjudication as to such applications, as the Commission made clear in its January 23, 1968 press release (J.S. 50). Appellants contend that strict compliance with this rule is a mandatory prerequisite to the Commission's exercise of its discretionary authority to grant applications for temporary authority. The district court held that the shipper statements filed in this proceeding accomplished the purpose of the rule and contained reasonable responses to the eleven inquiries (J.S. 21). This is a simple factual determination and presents no substantial question for consideration by this Court. The district court did not hold that the Commission's rules did not have to be complied with. It held that a consideration of the rule as to supporting shipper statements in the light of the particular circumstances of this case led to the conclusion that the requirement of the rule had been fully met (J.S. 21). There is no question as to the adequacy of the shipper statements (which appellants improperly and unjustifiably term "boiler plate" (J.S. 5)) except as to the response to items 8 and 9 which ask whether efforts were made to obtain the required service from existing carriers and the names of the carriers which failed or refused to provide the service. In response to these inquiries each of the shippers said in their supporting statements, which are a part of the record:

> "I am advised that effective on or about October 15, 1967, line-haul operations previously used by REA to move my express traffic will no longer be available, and that, as of that date, REA will not be able to continue to furnish me with the express service it now does, unless it can obtain authority to operate its own

trucks in lieu of the line-haul operations being discontinued. I would be seriously inconvenienced, and my business would be adversely affected if the particular type of service currently received from REA were to become unavailable. Accordingly, I support REA's application for authority to operate its own trucks in lieu of the line-haul operations previously used by it.

"I use all types of common carrier services, and I am familiar with all available. For that part of my traffic now moved in REA's express service, no other service could adequately meet my needs. If the service now furnished me by REA became unavailable, I would be seriously inconvenienced, and my business adversely affected.

"I am currently obtaining the service I need from REA Express, and, accordingly, have had no occasion to seek express service from anyone else. Within my knowledge, however, no service other than that of REA possesses all of the special characteristics required for adequate handling of my express shipments. If REA service became unavailable, I would have an immediate and urgent need which no other carrier could meet."[5]

The district court properly held that inquiries 8 and 9 of the rule were reasonably answered when the shippers explained in their statements *why* they had made no efforts to obtain express service from existing carriers, particularly in view of the statement in REA's application that no comparable service existed in the territory and in light of the failure of the appellants to allege facts showing that they were providing transportation comparable in all respects to the service of REA (S.J. 21). It would be a vain and

[5]This is the response given by each shipper to items 8 and 9 of the rule, and, accordingly, the responses to items 10 and 11 were renumbered 9 and 10 in the shippers' answers. Thus the statement in footnote 3, J.S. 5 incorrectly sets forth the response of the shippers to item 9 of the rule.

futile thing to require the shippers to state that they had looked elsewhere and found no comparable service in response to inquiries 8 and 9 of the rules, and it borders on the absurd to argue, as appellants have, that failure of the supporting shippers to make such a statement deprives the Commission of its discretionary power to grant the application for temporary authority.

The district court specifically found that REA was an express carrier and that appellants did not offer a comparable service (J.S. 21). As to this finding there can be no dispute on the basis of existing authorities. The Commission has long recognized a distinction between general-commodity motor carrier service, such as provided by appellants, and an express service such as that provided by REA. *Railway Express Agency, Inc. Extension—Durant-Kosciusko,* 34 M.C.C. 111, 114 (1942); *Mistletoe Express Service Extension—Texas,* 61 M.C.C. 737, 744-45 (1953); *Transportation Activities of Arrowhead Freight Lines,* 63 M.C.C. 573, 579-83 (1955). Commission decisions clearly recognize that "express service" connotes unique characteristics distinct from ordinary motor carrier service. *Freight, All Kinds, L.C.L. Container Charges—U.S.A.,* 323 I.C.C. 468 (1964); *Men's & Boys' Outerwear—Bruceton, Tenn. to U.S.A.,* 325 I.C.C. 284 (1965). The distinction between express and ordinary motor freight service formulated by the Commission has been adopted by the lower federal courts and approved by this Court. *Auclair Transportation, Inc.* v. *United States,* 221 F.Supp. 328 (D. Mass. 1963) *aff'd per curiam,* 376 U.S. 514 (1964). The distinction between the motor freight service performed by appellants and the express service performed by REA is well established as a matter of law.

Even though existing carriers were known to the shippers and receivers to be unable to provide express service, appellants nevertheless contend that their failure to make the

inquiries called for by items 8 and 9 of the Commission's rule rendered the application fatal. In support of this contention that the Commission is bound by its administrative regulations, appellants cite the press release of the Commission of January 23, 1968 (J.S. 50-51). Yet, the last paragraph of this release states that temporary authority applications will be denied where, because of noncompliance of the rules, "a fair adjudication is not possible on the record before the Commission." It is clear, as found by the district court, that the record contained ample information to enable the Commission to render a fair adjudication (J.S. 21).

The district court has found that the shipper statements complied with the rules by "reasonably" answering the inquiries of 8 and 9 (J.S. 21). Certainly no greater standard of particularity is required in complying with administrative regulations. The Commission cannot, by the promulgation of rules pertaining to the form and content of shipper statements, divest itself of the discretion conferred on it by 49 U.S.C. 310a(a). *Roadway Express, Inc.* v. *United States,* 263 F.Supp. 154 (N.D. Ohio 1966). Yet this is inevitably the result if, as appellants contend, the rules in question are absolutely binding on the Commission. As the district court aptly said in *Roadway Express, Inc.* v. *United States, supra:*

> ". . . [A] reading of these rules indicate that their purpose is to facilitate the Commission's handling of requests for temporary authority. The rules reflect no intention to reduce or relinquish its statutory discretionary power to issue certificates of temporary authority." (p. 159)

Appellants rely on the case of *Mississippi Valley Barge Line Company* v. *United States,* 252 F.Supp. 162 (E.D. Mo. 1966) as authority that the Commission, though acting pursuant to statutory discretion, is nevertheless rigidly

bound by its rules and regulations. That case is readily distinguishable from the present case on at least two separate grounds: (1) *Mississippi Valley* involved a grant of *permanent authority* under entirely different Commission rules than those governing applications for temporary authority. The rules governing temporary authorities have been expressly held not to limit in any way Commission discretion in considering such applications. *Roadway Express, Inc.* v. *United States, supra.* (2) The application for permanent authority in *Mississippi Valley* contained fraudulent misrepresentations and showed a wilful attempt on the part of the applicant to deceive the Commission and circumvent its rules. In the present case there was no evidence of fraud or deception. If anything, the application and supporting shipper statements show a studied effort to comply with Commission rules. Other cases cited by appellants to the effect that the Commission, acting pursuant to statutory discretion, is absolutely bound by temporary authority regulations are likewise not in point.[6]

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[6]*Service* v. *Dulles,* 354 U.S. 363 (1957) involved a situation where discretionary action by a government administrator was expressly foreclosed by regulation unless certain procedures had been followed. I.C.C. regulations pertaining to the form and content of shipper statements impose no such limitation on Commission discretion to grant temporary authority under Section 210a(a). See *Roadway Express, Inc.* v. *United States, supra.*

The regulations of the Federal Communications Commission involved in *Columbia Broadcasting System, Inc.* v. *United States,* 316 U.S. 407 (1942) prohibited radio stations throughout the country from entering into certain types of contracts with broadcasting networks such as CBS. Failure by a station to observe the regulation resulted in loss of its FCC license. These regulations are clearly unlike the I.C.C. regulations concerning the content of shipper statements, which were promulgated merely to provide a procedural guideline for the preparation and processing of temporary authority applications.

2. There is No Conflict Between the Fourth and Ninth Circuits

Appellants' attempt to predicate jurisdiction on alleged conflict in the decisions of the Fourth and Ninth Circuits is feeble and without merit. In *Acme Cartage Co.* v. *United States,* 290 F.Supp. 453 (W.D. Wash. 1968) both the applicants and the protestants were engaged in motor *freight* transportation. In the present case, while appellants are motor freight carriers, REA is an *express* carrier. In the *Acme Cartage* case the protestant carriers were apparently providing the same freight service as that proposed by the applicants. Under these circumstances the information called for by inquiries 8 and 9 of the rule had relevance to the disposition of the application. In the present case, however, it is clear from the record that REA's express service is unique and distinct from the motor freight service performed by appellants. Moreover, the court in *Acme Cartage* found that the information called for by inquiries 8 and 9 of the rules was not only omitted from supporting statements but did not appear *elsewhere* in the record. In sharp distinction, in the present case the information called for in 8 and 9 was found by the court below to be provided elsewhere in the record.[7] It is submitted that the supposed conflict of decision between the two circuits simply does not exist and therefore, the judgment below should be affirmed. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387 (1923).

3. No Settled Administrative Construction

As an additional ground for this Court's taking jurisdiction in this case, appellants contend that the decision of the

[7]After distinguishing the *Acme Cartage* case, Judge Butzner, referring to the present case, states "Here lack of comparable service is indicated by the shippers' statements, REA's statement, and, indeed, can be inferred from the protest itself" (J.S. 21).

district court in some way reverses alleged settled administrative construction of Section 49 U.S.C. 310a(a), citing *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496 (1948). There is no evidence in the record in this case of long standing administrative construction which the district court has reversed. The Commission adopted new rules in 1965 with respect to the filing and processing of applications for temporary authority to assist it in making fair adjudication of the applications. The publication of these rules and of the press release concerning them referred to by appellants clearly do not constitute any long-settled administrative construction of Section 49 U.S.C. 310a(a).

In *Commissioner* v. *South Texas Lumber Co., supra,* relied on by appellants, there were regulations of the Commissioner of Internal Revenue and long-standing tax practices recognized by statutes and judicial opinions which were alleged to be contrary to the decision of the Fifth Circuit in that case. No such situation exists in the present case. The decision of the United States District Court in Ohio in 1966 in *Roadway Express, Inc.* v. *United States, supra,* that the Commission's rules concerning applications for temporary authority adopted in 1965 were intended to facilitate the Commission's handling of requests for temporary authority and did not reflect an intention on the part of the Commission to reduce or relinquish its statutory discretionary power to issue certificates of temporary authority correctly states the purpose of the rules and the interpretation which the Commission has placed on the statute in issuing these rules. The district court in the present case said and held nothing which is inconsistent with this interpretation.

4. A Final Decision Will Not Reduce Litigation on Applications for Temporary Authority

Appellants complain that the judgment of the district court makes impossible any rebuttal of the supporting shippers' claims of a need for the proposed service. This complaint can only be based upon appellants' misinterpretation of the district court's opinion. Appellants state that the district court held, in effect, that supporting shipper statements did not have to meet all the requirements of 49 C.F.R. § 1131.2(c) (J.S. 11). Yet the plain and clear holding of the court below was that the rules were "reasonably" met (J.S. 21).

Next, based upon their incorrect interpretation of the opinion below, appellants conclude that the decision means that REA is no longer subject to the requirements of Section 210a(a) of the Interstate Commerce Act. This conclusion is simply not supported by the judgment of the district court. Appellants then launch into what appears to be an attack on practice and procedure before the Commission. Their argument relating to the duration of grants of temporary authority and the unduly prolonged procedure of obtaining corresponding permanent authority is not a proper subject matter for this appeal. If appellants feel this strongly that practice and procedure before the Commission produces injustice, their remedy is legislative, not by appeal to this Court.

Finally appellants claim that if this Court notes probable jurisdiction and decides the questions presented, a substantial part of the litigation now anticipated under 49 U.S.C. 310a(a) (temporary authority) and 49 U.S.C. 307 (permanent authority) will be effectively checked. In support of this assertion, appellants cite and quote from two decisions of this Court which, while announcing a sound principle, have no application in the present case. Conse-

quently, this case does not have any appreciable effect on future litigation before the Commission.

In *Alco S.S. Co.* v. *United States,* 338 U.S. 421 (1949), this Court granted certiorari in order to interpret certain terms in the government's standard bill of lading because there were a large body of similar claims at that time pending which would be determined by such interpretations. In *Ludecke* v. *Watkins,* 335 U.S. 160 (1948), this Court granted certiorari to make a final determination as to the meaning of the words "dangerous" and "declared war" in the Alien Enemy Act of 1798, partly because there were 530 alien enemies under order to leave the United States whose disposition awaited the Court's determination of the meaning of these words in the statute.

We have no such situation in the present case where the final outcome will have any controlling effect on subsequent applications for temporary or permanent authority as each must be decided on its own facts as disclosed by the application, the supporting shipper statements and other evidence produced by the applicants and the protestants.

CONCLUSION

Though appellants have attempted to give this case the appearance of substantiality, it involves, at most, the question whether the district court erred in its factual finding that the supporting shipper statements "reasonably" complied with the Commission's rules. It is clear from the entire record that the Commission's action was proper. There is no basis for appellants' assertion that the decision of the district court in effect carves out a special status for REA when seeking temporary operating authority from the Commission. The district court merely found that the Commission's rules had been reasonably complied with and that it was justified on the record in this case in making the factual

determination, in the exercise of its discretionary authority, that the motor freight carriers, who are the appellants in this case, were not offering service which was comparable in all respects to that provided by REA on the route in question. The district court's decision went no further than this and will have no profound or important effect on the transportation industry. In affirming the action of the Commission the district court properly exercised its jurisdiction with its limited scope of review extending solely to the issue of whether the Commission's determination of immediate and urgent need was arbitrary, capricious or without authority of law. *Hussey* v. *United States,* 271 F. Supp. 650 (N.C. Cal. 1967).

It is therefore respectfully submitted that appellants present no substantial question for the decision of this Court; that no conflict exists between the Circuits on the question at issue; and that the judgment and decree of the district court should be affirmed.

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CERTIFICATE OF SERVICE

I, H. Merrill Pasco, an attorney for the appellees and a member of the Bar of the Supreme Court of the United States, certify that a copy of the Motion to Affirm of appellee, Railway Express Agency, Incorporated has been served by first-class mail, postage prepaid, upon the following parties: Hon. Erwin Griswold, Solicitor General, Hon. Edwin M. Zimmerman, Assistant Attorney General, and John H. D. Wigger, Attorney, Department of Justice, Washington, D. C. 20530; C. V. Spratley, Jr., United States Attorney, Alexandria, Virginia 22313; Robert W. Ginnane, General Counsel, and Raymond M. Zimmet, Attorney, Interstate Commerce Commission, Washington, D. C. 20423; Francis W. McInerny and Harry J. Jordan, MacDonald & McInerny, 1000 Sixteenth Street, N.W., Washington, D. C. 20036; Linwood C. Major, Jr., Major, Sage, Vance & King, Suite 301 Tavern Square, 421 King Street, Alexandria, Virginia 22314.

Dated at Richmond, Virginia this 4th day of April, 1969.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1121

ESTES EXPRESS LINES, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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APPELLANTS' REPLY TO MOTIONS TO AFFIRM

STATEMENT

Appellees' Motions to Dismiss are grounded upon the gratuitous assumption that there is a difference in the service provided by Railway Express Agency, Inc. (REA), between Washington, D. C., and Richmond, Va., and that of appellants. Stated otherwise, they claim that there is an essential difference in the motor carrier service provided by REA and the service of general freight carriers, as they term appellants. Accordingly, they conclude that the supporting shippers knew there to be a difference in the service provided by REA and the service of appli-

cants, and there was no need for them to submit those items of information required to be submitted by applicants generally under the regulations set forth in 49 C.F.R. 1131.2(c) (8)-(9), quoted at pages 7-8 of the Jurisdictional Statement (J.S.). Appellees assume, without fact or other support, the validity of their *implied exemption* theory and then assert that there is no conflict between the Fourth and Ninth Circuits because the contesting carriers involved in *Acme Cartage Co.* v. *United States*, 290 F. Supp. 453 (W.D. Wash. 1968) were all general freight carriers and thus full compliance with the governing regulation was there required. On their invalid assumption to the effect that REA's proposed service is different from that rendered by appellants, they reach the necessarily erroneous conclusion that a real distinction underlies the Fourth Circuit's refusal to follow the decision of the Ninth Circuit.

ARGUMENT

A. As A Matter Of Fact And Law There Is No Essential Difference Between The Services Provided By Appellants And Those Provided By REA

While appellants concede that some general commodity carriers may not render a full blown "express service" on all commodities, that situation does not prevail here. The reason for the difference in service in other cases is that the franchises held by some general freight carriers contain restrictions preventing them from handling certain classes of traffic. See, for example, *Railway Express Agency, Inc.—Extension—Nashua, N. H.*, 91 M.C.C. 311 (1962). However, a certificate authorizing the transportation of general commodities without restriction includes the right to transport express. *Transportation Activities of Arrowhead Freight Lines*, 61 M.C.C. 131 (1952); *Sheetz Common Carrier Application—Express*, 10 M.C.C. 393, 395 (1938). Moreover, the fact that a motor carrier's authority is restricted against the transportation of liquid commodities in tank vehicles, commodities re-

quiring special equipment, and household goods does not prevent the carrier from providing an express service. *Railway Express Agency, Incorporated — Extension — Nashua, N. H., supra* at 329; *Mistletoe Express—Extension—Texas*, 61 M.C.C. 737, 747 (1953).

Appellant, Wilson Trucking Corporation, holds certificated motor carrier authority to transport general commodities, except commodities in bulk,[1] between Richmond, Va., and Washington, D. C., over U.S. Highway 1 and Interstate Highway 95, serving the intermediate and off-route points of Woodbridge, Quantico, Fredericksburg, and Ashland. Just as REA does, Wilson holds itself out (1) to transport any commodity which may be safety transported in ordinary van-type equipment, including those requiring a maximum degree of care or security or both, (2) to provide such care or security or both as the inherent characteristics of the commodities making up the shipments which are accepted may require, (3) to provide equally expeditious transportation and careful handling for all accepted shipments, regardless of their volume, special demands, or value, from the point of pick-up to the point of delivery, (4) to perform actual operations between all authorized points upon firmly established schedules allowing minimum practicable highway transit time and providing fixed delivery times which are available to actual and potential shippers at authorized origins and which in practice are not changed except after substantial notice to the general public, and, (5) to use relatively simple billing, rate structures, and rate publications whereby the rates and charges for the services offered and performed may easily be determined with a minimum of delay.

That Wilson renders a service identical to that of REA is made manifest by the fact that it has been transporting

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[1] Authority to transport general commodities, moving in express service, does not authorize the transportation of commodities in bulk. Thus, *REA* may not transport such commidities either. *Railway Express Agency, Inc.—Extension—Nashua, N.H. supra.*

traffic between Richmond, on the one hand, and, on the other, Bremo, Scottsville, and Smithfield, Va., in connection with REA. It has transported live animals, flowers, furs, and other valuable articles. It has provided protective services in transit for freight requiring it and also offers armed guard service when requested. (Appellants' Joint Protest, pp. 15-16.)

Similarly, appellant Estes Express Lines holds authority to transport, over regular routes, general commodities (with certain exceptions not here pertinent) and provides regularly scheduled service on the movement of small parcel traffic between Alexandria and Richmond. Estes Express participates in a number of so-called agency tariffs and interlines with connecting carriers at its principal terminal points traffic moving to and from points throughout the United States. Again, in refutation to the improperly assumed *difference in service* theory urged by appellees, Estes Express participates with REA in the latter's Motor Tariff ICC A-3, Item Nos. 7450, 7500, and 7550 issued by L. R. Burke, effective February 24, 1967, in the transportation of express traffic serving a number of points in Virginia. (*Id.*, at 10-11) The remaining appellants hold a wide variety of general commodity authority and offer regularly scheduled service in the movement of small parcel traffic in the area under consideration. (*Id.*, at 12)

Contrary to appellees' contention,[2] there is no essential difference in the character of the service being provided

[2] Significantly, in *Saginaw Transfer Co.* v. *United States*, 275 F. Supp. 585 (E.D. Mich. N.D. 1967), the court refused to rubber stamp the Commission's finding that the service proposed was an express service because it was to be provided by REA. The court chastised the Commission for employing the term "express service" in attempting to support the order there under attack and at the same time failing to define the term. Here, appellants are faced with a somewhat similar situation in that we are told to wait until the permanent application is resolved to determine whether appellants are able to provide the service or even whether such service is a true express service. This may take years as the history of the ICC's handling of REA applications proves.

by REA between Washington, D. C., and Richmond, Va., and that rendered by Estes Express and Wilson. Appellants are providing "express" service both in fact, and as that term has been employed in the transportation industry and as described and applied by the ICC.

Since Wilson and Estes Express are providing an "express service" in connection with REA in Virginia as parties to tariffs with appellee and hold authority and have expressed the willingness to provide the same type of service between Washington and Richmond, this case is not factually distinguishable from *Acme Cartage*. Moreover, to further highlight the conflict in the Circuits, the United States District Court for the Western District of Washington, Southern Division, has rendered another decision (*Black Ball Freight Service*, et al. v. *United States*, Civil Action No. 3828, decided March 26, 1969) following its prior holding in *Acme*. For the convenience of the Court, a copy of the opinion of the District Court (not yet reported) is appended.

B. The Suggestion That All Issues Will Be Properly Resolved In The Permanent Application Proceeding Reveals The Evils Of The Commission Action In This Case

The Government contends that appellants "exalt form over substance" and that the action of the Commission "is merely a preliminary determination designed to maintain the existing express service for the time being." (pp. 4-5) The foregoing approach had to be taken by the Government because it recognized that the teaching of *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942), *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), and *Service* v. *Dulles*, 354 U.S. 363 (1957), had been ignored by the Commission. Nowhere does the Government attempt to come to grips with the issues raised in the Jurisdictional Statement. Being unable or unwilling to discuss the essential points raised by appellants, the Government, with a "pillow punching" approach, attempts

to persuade this Court through unexpressed but necessarily implied argument, that if appellants have been wronged, their wounds will be quickly bound. The faults with the approach taken are two: (a) the Government fails to meet with candor the issues raised, thereby depriving the Court of its right to know whether in fact the Commission violated its own regulations, and (b) it reveals that counsel for the Government refuses to recognize that delayed handling of REA permanent applications where temporary authority is outstanding results in a "built-in" denial of administrative due process in both the temporary authority proceeding and the permanent application.

It is argued that whether the temporary authority was infested with irregularity is of no consequence because regularity of procedure is assured later on. How much later? The Jurisdictional Statement forcefully demonstrates that *temporary* authority is a misnomer because the filing of a corresponding permanent application can result in operations by an applicant under temporary authority for years. (See footnote 6, J.S.) The Government's implied suggestion that the permanent proceeding will be resolved in a short time does not comport with the facts. The Commission has not published the permanent application (Docket No. MC-66562 (Sub-No. 2282)),[3] and appellants have been unable to get the Commission to do so, with the result that they cannot file a protest to the permanent application and have the matter set

[3] In footnote 4 to the Government's Brief, it is stated that the permanent application has been published. Counsel for appellants has been advised by the official at the Commission in charge of the publication of applications that Docket No. MC-66562 (Sub-No. 2282) has not been published in the Federal Register. The Government's citation to the Federal Register refers to a so-called "hub application" recently filed by REA. At page 17513 service is proposed between Washington and Richmond. However, the application does not embrace all the authority sought in Docket No. MC-66562 (Sub-No. 2282). Furthermore, REA makes no claim in its Motion that the permanent application has been published.

down for hearing. In the meantime, appellants are faced with a competitor based upon the Commission's bald characterization of their service as general freight service.

C. The Doctrine Of Mississippi Valley Fully Applies

In the Jurisdictional Statement, *Mississippi Valley Barge Company* v. *United States*, 252 F. Supp. 162 (E.D. Mo. 1966) was cited for the proposition that a valid administrative regulation binds the administrator equally with others, the same as though the provisions of the regulation were prescribed in terms of statute. In other words, we read *Mississippi Valley* as holding that the Commission's regulations dealing with the content of supporting statements have the force and effect of law, bind the Commission like all others, and cannot be waived by the ICC. As to REA's attempt to distinguish *Mississippi Valley*, we submit the doctrine expressed in that case, as well as *Service*, *Accardi*, and *Columbia*, *supra*, is unassailable. Additionally, the ICC's temporary authority rules have a common ground with those involved in *Mississippi Valley*; they are both designed to prevent fraud and misrepresentation.

Railway Express cites *Roadway Express, Inc.* v. *United States*, 263 F. Supp. 154 (N.D. Ohio 1966) in support of its position that the ICC does not have to adhere strictly to its temporary authority regulations. This case is cited for the statement by the court that the Commission is not precluded from exercising its discretionary action to issue certificates of temporary authority on the basis of the rules it has adopted. The court's statement was *dicta*. Prior to this observation, the court noted that during oral argument plaintiff, Roadway Express, for the first time raised the point that the submitted statements of applicant Jack Cole Company in support of its applicaton for temporary authority did not conform to requirements of rules adopted by the Commission, effective July 1, 1965. The court then stated (p. 159), "This ground of

objection to the granting of temporary authority was not raised before the Commission and is deemed waived." Thus the court in *Roadway* never passed upon the issue. Certainly the *obiter dicta* of *Roadway* cannot stand as authority when other courts have more recently in dealing directly with issues involving temporary authority rules and regulations held to the contrary. See *Acme* and *Black Ball, supra.*

CONCLUSION

REA, and appellants, are motor carriers subject to Part II of the Interstate Commerce Act. There is no language in Section 210a(a) or the Commission's Temporary Authority Regulations giving any special consideration or exemption to REA as distinguished from other motor carriers.[4] REA was requred to comply fully with the mandatory requirements of 49 C.F.R. 1131.2(c) as any other motor carrier; it failed to do so and, therefore, the Commission's finding of an immediate and urgent need for its service was arbitrary, capricious, an abuse of discretion, and error of law. If the Commission feels the need for another set of rules regarding temporary authority applications of REA, it should amend its Temporary Authority Rules; for as the court said in *Acme Cartage* (J.S. p. 49):

> Variable and unpredictable enforcement of important and mandatorily stated rule provisions is inequitable in principle and unsound in practice. If particular rules prove over rigid or otherwise unsatisfactory in practice they can be amended as experience dictates. *Service* v. *Dulles*, 354 U.S. 363 (1957); *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407 (1942).

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[4] The conventional rule of statutory interpretation is that where an exemption could have been provided expressly and was not, there is no warrant for implying an exemption. 50 AmJur, §§ 432-433.

For the foregoing reasons, appellants respectfully submit that the questions posed by the decision below are of extreme public importance and require plenary consideration by this Court. Therefore, appellants request that the Motions to Affirm be denied.

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CERTIFICATE OF SERVICE

I, Harry J. Jordan, an attorney for the appellants and a member of the Bar of the Supreme Court of the United States, certify that a copy of Appellant's Reply to Motions to Dismiss has been served by first-class mail, postage prepaid, upon the following parties: Hon. Erwin Griswold, Solicitor General, Hon. Richard W. McLaren, Assistant Attorney General, and Gregory B. Hovendon and Robert E. Easton, Attorneys, Department of Justice, Washington, D.C. 20530; C. V. Spratley, Jr., United States Attorney, Alexandria, Virginia; Robert W. Ginnane, General Counsel, and Raymond M. Zimmet, Attorney, Interstate Commerce Commission, Washington, D.C. 20423; John G. Ashton, Vice President and General Counsel, and William H. Marx, Assistant General Counsel, Railway Express Agency, Incorporated, 219 East 42nd Street, New York, New York 10017; H. Merrill Pasco, Esquire, Hunton, Williams, Gay, Powell & Gibson, 700 East Main Street, Richmond, Virginia 23212.

Dated at Washington, D. C., this 15th day of April, 1969.

HARRY J. JORDAN
1000 - 16th Street, N. W.
Washington, D. C. 20036

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

Civil Action No. 3828

BLACK BALL FREIGHT SERVICE; CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE; D-C INTERNATIONAL, INC.; GARRETT FREIGHTLINES, INC.; NAVAJO FREIGHTLINES, INC.; PACIFIC INTERMOUNTAIN EXPRESS CO.; WESTERN GILLETTE, INC.; RISS & COMPANY, INC.; IML FREIGHT, INC.; and AMERICAN TRUCKING ASSOCIATIONS, INC.,

Plaintiffs,

YELLOW FREIGHT SERVICE; T.I.M.E. FREIGHT, INC.; TRANSCON LINES, INC.; CONSOLIDATED COPPERSTATE LINES; TRI-STATE MOTOR TRANSIT CO.; UNITED TRANSPORTS, INC.; BRASWELL MOTOR LINES, INC.; CENTRAL FREIGHT LINES, INC.; CENTRAL EXPRESS, INC.; RED ARROW FREIGHT LINES; BROWN EXPRESS, INC.; ALAMO EXPRESS, INC.; J. H. ROSE TRUCK LINE, INC.; J. J. WILLIS TRUCKING CO.; J. V. HARRISON TRUCK LINES, INC.; MILLER TRUCK LINE, INC.; H. S. ANDERSON TRUCKING CO.; CENTRAL FORWARDING, INC.; ROBERTSON TANK LINES, INC.; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; THE COLORADO AND SOUTHERN RAILWAY COMPANY; THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; ELGIN, JOLIET AND EASTERN RAILWAY

COMPANY; FORT DODGE, DES MOINES AND SOUTHERN RAILWAY COMPANY; FORT WORTH AND DENVER RAILWAY COMPANY; GREAT NORTHERN RAILWAY COMPANY; GREEN BAY AND WESTERN RAILROAD COMPANY; GULF MOBILE AND OHIO RAILROAD COMPANY; ILLINOIS CENTRAL RAILROAD COMPANY; ILLINOIS TERMINAL RAILROAD COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD; MISSOURI PACIFIC RAILROAD COMPANY; NORFOLK AND WESTERN RAILWAY COMPANY; NORTHERN PACIFIC RAILWAY; ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; THE TEXAS AND PACIFIC RAILWAY COMPANY; TOLEDO, PEORIA AND WESTERN RAILROAD COMPANY; AND UNION PACIFIC RAILROAD AND WATERLOO RAILROAD,

Intervening Plaintiffs,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants,

AMERICAN FARM LINES,
Intervening Defendant.

OPINION—FINDINGS OF FACT—CONCLUSIONS OF LAW

Before: JERTBERG, Circuit Judge, and BOLDT and GOODWIN, District Judges

BOLDT, District Judge:

American Farm Lines (AFL) made an application under the provisions of Section 210a(a) Interstate Com-

merce Act, 49 U.S.C.A. Section 310a(a)[1] and Ex Parte No. MC-67, *Motor Carrier Temporary Authorities*, 98 M.C.C. 483, 49 C.F.R. 1131, et seq., to the Interstate Commerce Commission (ICC) for a Temporary Authority to provide single-line motor carrier service. The application appeared in the Federal Register June 8, 1968. The thirty-five motor carrier plaintiffs in this action, twenty-eight intervening rail carrier plaintiffs and many other carriers, protested the application. The Temporary Authorities Board of the Commission (TAB) by order dated July 12, 1968, denied the application. AFL filed a petition for reconsideration, appealing the decision of TAB. Division 1 of ICC, acting as an Appellate Division, by order dated September 3, 1968, vacated the order of denial issued by TAB and granted the application.

Some of the plaintiffs and other carriers filed petitions for reconsideration, which were not authorized by the applicable rule, Ex Parte No. MC-67, *Motor Carrier Temporary Authorities*, 98 M.C.C. 483 at page 496, (49 C.F.R. 1131.6), since neither of the conditions authorizing such petitions was present:

> "(a) Petitions for reconsideration.—Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions for reconsideration of orders of (1) the Temporary Authorities Board, and (2) Division 1 initially granting or denying temporary authority in proceedings not subject

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[1] Interstate Commerce Act, Section 210a(a), as amended, 49 U.S.C. 310a(a), provides:

"To enable the provision of service for which there is an *immediate and urgent need* to a point or points within a territory having *no carrier service capable of meeting such need*, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter." (Emphasis added.)

to prior determination by the Temporary Authorities Board, may be filed by any interested person."

Plaintiffs' complaint was filed in this court on September 26, 1968, together with a motion for an order to stay the going into effect of the ICC order of September 3, 1968.

This motion was argued October 2, 1968 before Judge Boldt per Title 28, Section 2284(3) and (5). After considering oral and written evidence and the argument of counsel, the Court entered an order staying the going into effect of the ICC order of September 3, 1968, and declaring it to be otherwise inoperative pending determination in this Court of the issues presented in this proceeding, or until further order of this Court. At that hearing, counsel for ICC did not challenge the administrative finality of the ICC order of September 3, 1968. By its order of October 9, 1968, ICC recognized the stay order of this Court.[2]

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[2] "Upon consideration of the record in the above entitled proceedings, and the entry of a temporary restraining order on October 3, 1968, by the United States District Court for the Western District of Washington in Civil Action No. 3828, *Black Ball Freight Service, et al* v. *United States*, wherein the Court stated in part:

'IT IS ADJUDGED AND ORDERED that that certain order of Interstate Commerce Commission issued by it in its Docket MC-129908TA application of American Farm Lines, Oklahoma City, Oklahoma under date of September 3, 1968, be stayed from going into effect or otherwise be inoperative pending a determination by this Court of the issues of this proceeding, or until the further order of this Court.'

and good cause appearing therefor:

It is ordered, that the effective date and operation of the order heretofore entered September 3, 1968, in No. MC-129908TA be, and it is hereby, postponed until further order of the Commission.

It is further ordered, that in view of the Court's order and of the order of the Commission, American Farm Lines may not now perform any for-hire operations in interstate or foreign commerce pursuant to the Commission's order of September 3, 1968, entered in this proceeding.

On October 16, 1968, the Department of Defense filed with ICC a reply to the petitions for reconsideration, and on October 17, 1968, AFL filed a combined reply to the petitions for reconsideration and a petition to reopen. Many plaintiffs filed motions to strike these pleadings on the ground they were not authorized by ICC Rule 49 C.F.R. 1131.6, nor by any other rule.

On November 12, 1968, ICC filed in this court a "Motion to Stay Further Proceedings Herein," stating therein that on November 5, 1968, on its own motion, ICC had reopened the proceeding before it and requested a stay of further action in the case before this court. By their prompt opposition to this motion, plaintiffs contended that ICC was not authorized to reopen its proceeding because this court had taken jurisdiction of the matter. Also, plaintiffs asserted that even if the court had not taken jurisdiction, the ICC Rules precluded reopening of the proceeding. No action has ever been taken to note the ICC motion for hearing or to otherwise procure the stay sought by the motion.

The same contentions were presented to ICC in plaintiff's motion for vacation of the reopening order.

Since the ICC order of November 5, 1968 recited that a verified statement from the Department of Defense would be received, and no ruling having been made on their petitions to vacate the order of November 5, plaintiffs responded to the Caputo verified statement submitted by the Department of Defense. These responses asserted plaintiffs had satisfactorily performed all services previously requested of them and their willingness and ability to perform any service requested of them by any shipper, including the Department of Defense.

On December 19, 1968, ICC issued a new order in the same docket granting AFL the same temporary authority previously granted by the ICC order of September 3, 1968 as to which the stay order of this court was and still is in full effect.

On December 31, 1968, pursuant to Fed. Civ. R. 15(d), plaintiffs filed in this court a "Supplemental Complaint Setting Forth Transactions or Occurrences or Events Which Have Happened Since the Date the Original Complaint was Filed Herein" and a motion to stay the going into effect of the ICC order of December 19, 1968.

Following extended argument, on January 6, 1969, Judge Boldt entered an order restraining the going into effect of the ICC order of December 19, 1968 and ordering it to be inoperative until further order of this court. Full hearing on the merits was heard by the Three-Judge Court on January 24, 1969.

The issuance of the ICC order of September 3, 1968 was based on a supporting letter written by the Department of Defense, dated May 15, 1968. The ICC also had before it a letter dated April 30, 1968 written to the president of AFL wherein the Department of Defense stated it was not in a position to verify that there would be insufficient or inadequate service to meet Department requirements in the absence of the single-line service AFL seeks to provide.

"As authorized by the ICC Act, after extended consideration the ICC adopted Temporary Authority Rules, effective July 5, 1965, specifying procedures for the submission and determination of temporary authority applications under Section 210(a) ICC Act. Ex Parte No. MC-67, 49 C.F.R. 1131. . . . The rules specifically provide in mandatory terms that each filed temporary authority application must be accompanied by one or more supporting statements and each such statement must contain at least the information specified in eleven categories," *Acme Cartage Co., et al.* v. *United States, et al.*, 290 F.Supp. 453 at page 454. Among those categories are:

"(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

"(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal."

The ICC Rules, 49 C.F.R. 1131 et seq., provide for the filing and processing of written temporary authority applications and establish standards and mandatory procedures applicable to all phases of the submission and determination of such applications. Except for supporting statements by the Department of Defense, the rules require "certified" evidentiary statements by the supporting shippers claiming to need the new service, and further require factual statements in a minimum of eleven specific categories. The rules require notice of the proceeding to be given by publication in the Federal Register and authorize protest of the application by "persons who can and will provide all or any part of the proposed service". Each protest must specify the service the protestant can and will offer and must be served upon the applicant. Submission of supplemental data after the applications are filed is not permitted. The ICC rules establish specific evidentiary standards for determination of each application for temporary authority and provide that grants "shall be only made" where the evidence "establishes" an immediate and urgent need in accordance with the prescribed standards.

Rule 49 C.F.R. 1131.4(b)(4) pertaining to single-line service provides:

> "Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in, meeting the reasonable immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved."

Plaintiffs assert the initial supporting letter accompanying AFL's temporary application did not provide the information required by 49 C.F.R. 1131.2(c), particularly (8) and (9) thereof, and that granting of the temporary authority in question without a showing of the required information in effect denied them consideration of their protests. Plaintiffs contend no specific failure of service by plaintiffs has been asserted to which specific response could be made and that their response to generalities could only be met by their general assertions.

In their answer, defendants admit:

> "With respect to the allegations contained in the initial complaint, admit that the order of the Commission dated September 3, 1968 may not have been based upon evidence to support its conclusion."

In their brief, the defendants admit:

> "* * * That the Commission's order of September 3, 1968 (1) may not have been based upon evidence to support its conclusions."

These concessions indicate the ICC itself had strong misgivings concerning its compliance with the rules ICC itself had promulgated.

Defendants contend the ICC order dated September 3, 1968 became moot when ICC reopened the proceeding on November 5, 1968. This contention is without merit. Prior to reopening of the proceeding which resulted in the ICC order of September 3, 1968, judicial review of that order had been perfected pursuant to 28 U.S.C. 1336. Jurisdiction thereof vested in and had been exercised by this court in an extended evidentiary hearing wherein ICC actively participated. Following such hearing the stay order of this court was entered. In these circumstances, without prior leave of court, ICC was without authority to take any action which directly or indirectly might nullify or impair the jurisdiction of this court over the ICC order under review.

Defendants further contend that the ICC order of September 3, 1968 was not administratively final. However, at the oral argument on the merits defendants conceded that plaintiffs were properly in court seeking review of that order.

Plaintiffs assert that the September ICC order was administratively final under the Temporary Authority Rules, 49 C.F.R. 1131.6, and that if those rules do not govern, the general ICC rule, 49 C.F.R. 1100.101(a)(2), is applicable:

> "All decisions, orders or requirements of a division of the Commission in any proceeding shall be considered administratively final, except those involving issues of general transportation importance, those wherein the division reverses, changes or modifies a prior decision by a *hearing officer*, and those wherein the initial decision is made by a division." (Emphasis added.)

Indisputably this proceeding did not involve action by a hearing officer, but rather a reversal by ICC Division 1 of a prior determination by its Temporary Authority Board.[3]

Title 28 U.S.C. Section 1336 provides:

> "*Interstate Commerce Commission's orders.* (a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

The Supreme Court stated in *Pennsylvania Railroad Company* v. *United States*, 363 U.S. 202 (1960):

> "We decided some years ago that while a mere 'abstract declaration' on some issue by the Commission

[3] The disposition of an application by a Board does not constitute a hearing before a hearing officer. Compare Trans-American Freight Lines, Inc. v. U.S., 258 F.Supp. 910 (1966).

> may not be judicially reviewable, an order that determines a 'right or obligation' so that 'legal consequences' will flow from it is reviewable. Rochester Tel. Corp. v. United States, 307 U.S. 125, 131, 132, 143, 83 L ed 1147, 1152, 1153, 1159, 59 S.Ct. 754."

And further:

> "We have held that judicial review is equally available whether a Commission order relates to past or future rates, or whether its proceeding follows referral by a court or originates with the Commission. El Dorado Oil Works v. United States, 328 U.S. 12, 90 L ed 1053, 66 S.Ct. 843."

In Inland Steel v. U.S., 306 U.S. 153 (1939), the Court stated:

> "*Third.* The appellant takes the position that the Commission's purported postponement of its command to cease and desist (eighteen months after the interlocutory injunction was granted) deprived the court of authority to enforce the conditions of its interlocutory injunction. However, since the court had exercised jurisdiction to review and suspend the Commission's report and order, the administrative body was without power to act inconsistently with the Court's jurisdiction, had it attempted to do so . . ."

Defendants do not dispute the fact that the ICC order of September 3, 1968 was a final grant of temporary authority to AFL to engage in operations thereunder, subject only to compliance with tariff requirements, and that the order was at that time reviewable by a three-judge court. Defendants have cited several cases[4] in

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[4] Aberdeen & Rockfish RR v. United States, 270 F.Supp. 695 (E.D. La. 1967), Affirmed as Modified 393 U.S. 87 (1968); Alamo Express, Inc. v. United States, 239 F.Supp. 694 (W.D. Tex. 1965), Affirmed 382 U.S. 19 (1965); Donaldson v. Read Magazine, 333 U.S. 178 (1948); United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 294 U.S. 499 (1935); Anchor Line Limited v. Federal Maritime Commission, 299 F.2d 124 (Ct. of Appeals, D.C. 1962); Atchison, Topeka and Santa Fe Railroad Company v. United States, 231 F. Supp. 422 (N.D. Ill. E.D. 1964).

support of their argument that the ICC retains "continuing jurisdiction over its orders at all times." However, none of the cases deals with the question now presented, i.e. whether, after a court has review jurisdiction of an ICC order and a stay of that order has been entered by the court, the ICC may nullify the review and the stay order by reopening the ICC proceedings. The ICC itself has answered this question in Central Freight Lines, Inc. v. Strickland Transportation Lines, Inc., 102 M.C.C. 291.

> ". . . Moreover, when the Court has exercised jurisdiction to review and suspend a report and order of the Commission, we are without power to act inconsistently . . ."

Even if ICC had jurisdiction to reopen the ICC proceeding and to consider the Caputo verified statement, it would not meet the requirements of categories (8) and (9) of ICC Rule 49 C.F.R. 1131.2(c).

The Caputo verified statement fails to show any efforts by the Department of Defense to obtain from existing carriers the service AFL seeks to provide, or the identity of any existing carriers who failed or refused to provide the needed service and the reasons given for any such failure or refusal. Statement of these matters is mandatorily required by categories (8) and (9).

At best, the Caputo verified statement merely states the Department of Defense preference for the continuance of AFL's service and the expansion of that service into single-line service. AFL has been performing service for the Department of Defense under the provisions of 49 U.S.C. 303(b)(5), but no issue pertaining to that service is now before this court. The fact that the Department of Defense may desire a new or expanded type of service by a particular carrier does not justify the granting of temporary authority to provide such service without full compliance with all mandatory ICC rules.

While under 49 U.S.C. 310a(a) the ICC is vested with wide discretion to grant temporary authority for motor carrier services, it may only do so when both conditions specified in the statute are shown to exist, i.e. (1) "an immediate and urgent need" for service, (2) "within a territory having no carrier service capable of meeting such need." It is clear from the language of the statute that in the absence of either one or both of the conditions specified, ICC "has neither power nor discretion to grant temporary authority applications . . . Variable and unpredictable enforcement of important and mandatorily stated rule provisions is inequitable in principle and unsound in practice." Acme Cartage Co. v. U.S., supra, at 456-457.

The court's Findings of Fact and Conclusions of Law are hereby found and held as stated in the foregoing Opinion.

For the reasons stated, we find that the granting of each Temporary Authority referred to in the foregoing Opinion was arbitrary, capricious and erroneous in law. Accordingly, each of the Temporary Authorities should be and hereby is held null and void. The stay order as to each Temporary Authority is continued in effect until further order of this court.

DATED this 26th day of March, 1969.

/s/ Gilbert H. Jertberg
GILBERT H. JERTBERG
United States Court of Appeals Judge

/s/ George H. Boldt
GEORGE H. BOLDT
United States District Court Judge

/s/ William N. Goodwin
WILLIAM N. GOODWIN
United States District Court Judge

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

ESTES EXPRESS LINES ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 1121. Decided April 21, 1969.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.